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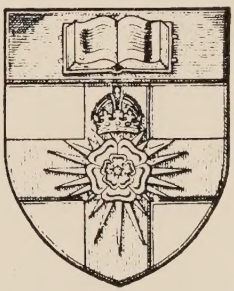

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1927.

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TAYLOR *v.* PAYNE.

[1926. P. 2639.]

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1927

Feb. 25 ; *March* 1.

Will—Construction—Absolute Gift—Cutting down absolute Gift—Intestacy.

A testator devised and bequeathed his residuary estate to his trustees upon trust to divide the same into five equal shares, and to appropriate one of such shares to each of his sons then living, whether such son survived him or not, provided always and he directed that the share so directed to be appropriated to each of his sons should not vest absolutely in them or their representatives, but should be retained by his trustees upon the trusts thereinafter declared, and he directed that his trustees should hold each share upon certain trusts therein contained during the lifetime of each son respectively, and he directed that his trustees should stand possessed of the share of each of his sons after his decease, or the decease of the testator in the case of a son predeceasing him, upon trust to appropriate such share unto the child or children of such deceased son, whether living at the testator's death or born afterwards or having died in the testator's lifetime leaving issue, and he empowered each of his sons who might survive him at any time by deed revocable or irrevocable or by will or codicil to alter the shares in which the share of such son should, after his death, be appropriated to his children if more than one.

ASTBURY J.

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PAYNE, *In re.*

TAYLOR *v.* PAYNE.

The testator died in 1917. One of his sons, F. G. P., died in 1926 without leaving issue, having by his will left all his estate to his wife, and appointed her his sole executrix:—

Held, that the rule in *Lassence* v. *Tierney* (1849) 1 Mac. & G. 551 and *Hancock* v. *Watson* [1902] A. C. 14 did not apply, and that the share of F. G. P. was undisposed of by the will of the testator.

THE testator by his will dated June 27, 1916, appointed executors and trustees of his will, and, after making various pecuniary and specific bequests, he devised and bequeathed all his real and personal estate not otherwise disposed of unto and to the use of his trustees upon trust for conversion as therein mentioned, and he directed that his trustees should, out of the moneys to arise from the sale, calling in, or conversion of his real and personal estate, make such payments as in his will mentioned, and should invest the residue of such moneys in the manner therein mentioned, and he stated that such residuary moneys and the investments representing the same were thereinafter called his "residuary fund," and by clause 10 the testator directed as follows: "My trustees shall stand possessed of my residuary fund in trust to divide the same and the investments into five equal shares, and to appropriate one of such shares to each of my sons now living, whether such son shall survive me or not, and so that any reference hereinafter contained to the shares of my respective sons in my residuary fund shall be deemed to apply and have reference to the shares hereinbefore directed to be appropriated to them respectively, whether they shall respectively survive me or not: provided always and I direct that the share so directed to be appropriated to each of my said sons respectively shall not vest absolutely in them or their representatives, but shall be retained by my trustees and held upon the trusts hereinafter declared concerning the same respectively," and the testator directed that his trustees should hold the share of each of his sons in his residuary fund upon certain trusts therein contained during their respective lives, and he directed that his trustees should stand possessed of the share of each of his sons in the residuary fund from and after his decease, or from and after his (the testator's) decease as

to any son predeceasing him (the testator) upon trust to appropriate such share unto such child or children of the son to whom such share should have been originally appropriated as should be living at his (the testator's) death, or born afterwards, or should have died in his (the testator's) lifetime leaving issue surviving him (the testator) in equal shares, provided always and he empowered each of his sons who might survive him at any time by deed revocable or irrevocable or by will or codicil to alter in any manner or to any extent he might think fit the shares in which the share of such son in the residuary fund should, after his death, be appropriated to his children if more than one as lastly thereinbefore provided.

The testator died on March 2, 19 7, leaving his five sons him surviving. One of his sons, F. G. Payne, died on October 20, 1926, without leaving issue. By his will he devised and bequeathed all his real and personal estate to his wife, the defendant, E. M. Payne, and appointed her sole executrix thereof. Questions having arisen as to the person or persons for whom, or the trusts upon which, the share of the testator's residuary fund directed to be appropriated to F. G. Payne ought to be held, the trustees of the testator's will issued this summons asking whether according to the true construction of the will, and in the events which had happened, the share of the residuary fund appropriated or directed to be appropriated to F. G. Payne passed on his death to his legal personal representative, or whether it was undisposed of by the will and was distributable as on intestacy, or whether it accrued to the other shares appropriated or directed to be appropriated under the provisions of the will, or who otherwise were entitled to such share.

Underhay for the plaintiffs.

Galbraith K.C. and *J. V. Nesbitt* for married sons of the testator. The real question is whether F. G. Payne took an absolute interest with superadded trusts that failed or whether he took a life interest only? We say that he

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took a life interest only, and that this case is governed by *Rucker* v. *Scholefield*. (1)

Percy C. Lamb for an unmarried son of the testator.

Bennett K.C. and *Guest Mathews* for the executrix of F. G. Payne. This was an absolute interest in the first instance. The point is dealt with in Hawkins on Wills, 3rd ed., p. 318. The rule in *Lassence* v. *Tierney* (2) applies. That rule, as explained in *In re Harrison* (3) and *Moryoseph* v. *Moryoseph* (4), applies to realty. The principle of *Hancock* v. *Watson* (5), where the rule in *Lassence* v. *Tierney* (2) is again laid down, is applicable here.

Galbraith K.C. in reply. *Rucker* v. *Scholefield* (1) has never been criticized. The question of whether there is an absolute gift in the first instance is dealt with in Jarman on Wills, 6th ed., pp. 1459, 1460, and in Theobald on Wills, 7th ed., p. 485.

ASTBURY J. This is a summons to determine whether, on the true construction of the will of the testator, a share of residue directed to be appropriated to one of his sons, who died without issue, passed to the son's personal representative or is undisposed of.

The question involves the application of the rule in *Lassence* v. *Tierney* (2), and raises a point which does not seem to have been raised in any of the authorities. By clause 10 of the will the testator directed his trustees to stand possessed of the share appropriated to each son on trusts declared in the will.

The question is whether on the true construction of clause 10 there was an absolute gift in the first instance of the appropriated share to each son. Whether an original gift is absolute or qualified is often a difficulty which arises in applying or excluding the rule in *Lassence* v. *Tierney*. (2) The rule is clearly laid down by Lord Davey in *Hancock* v. *Watson* (5), where he says: "The appellant's second point

(1) (1862) 1 H. & M. 36.
(2) 1 Mac. & G. 551.
(3) [1918] 2 Ch. 59, 62.
(4) [1920] 2 Ch. 33.
(5) [1902] A. C. 14, 22.

is that the two-fifths allotted to Susan Drake on failure of the gift over goes to the next of kin of the testator, and not to Susan's representatives as declared by the Court of Appeal. I confess to some surprise at hearing this point treated as arguable. For, in my opinion, it is settled law that if you find an absolute gift to a legatee in the first instance, and trusts are engrafted or imposed on that absolute interest which fail, either from lapse or invalidity or any other reason, then the absolute gift takes effect so far as the trusts have failed to the exclusion of the residuary legatee or next of kin as the case may be. Of course, as Lord Cottenham pointed out in *Lassence* v. *Tierney* (1), if the terms of the gift are ambiguous, you may seek assistance in construing it—in saying whether it is expressed as an absolute gift or not—from the other parts of the will, including the language of the engrafted trusts. But where the Court has once determined that the first gift is in terms absolute, then if it is a share of residue (as in the present case) the next of kin are excluded in any event. In the present case I cannot feel any doubt that the original gift of two-fifths of the residuary estate to Susan Drake was in terms an absolute gift to her. The testator uses the words 'I give,' and speaks of the shares subsequently as 'allotted' to her. Mr. Levett contended that there are words in the will which confine her interest in the allotted portions to her life. But that is not what the testator has said: he has directed that during her life she shall have only the income of her share for her separate use without power of anticipation. But that is quite consistent with a power to dispose of the capital after her death so far as it should not be exhausted by the trusts declared of it and with the right of her representatives to claim it. In other words, as between herself and the estate there is a complete severance and disposition of her share so as to exclude an intestacy, though as between her and the parties taking under the engrafted trusts she takes for life only." The difficulty here is to determine whether the appropriation should be regarded as an absolute gift

(1) 1 Mac. & G. 551.

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in the first instance with engrafted qualifications, or whether it is part of a series of directions to be read as a whole, as Wood V.-C. read the gift and limitations in *Rucker* v. *Scholefield* (1), where a power was given to a husband and wife to appoint amongst their children, with a proviso that no child taking under any appointment should be entitled to any part of the unappointed fund, without bringing his or her appointed share into hotchpot, unless the appointment contained an express direction to the contrary. The husband and wife exercised the power by deed poll. The words there were to appropriate one-fifth part, and to pay and apply the interest, dividends, and annual proceeds of each one-fifth part unto each of their five daughters, and upon trust after the death of each daughter to pay, apply, and dispose of her share amongst her children or their issue, as she should by will or deed appoint, and in default of any such appointment then equally between the children and issue of such daughters, and if one of the daughters should die without leaving issue, then her share should be in trust for such of her sisters as should be living at her death and the issue of such of them as should be then dead, but in case all the daughters died without leaving issue, then in trust to pay and divide the trust fund equally between such of the sons of the appointors as should be living and the issue of such of them as should be dead. There Wood V.-C. said (2): "In all cases of this kind, the question turns upon the language in which the appointment is attempted to be made. If you find a clear and definite gift of the property to be appointed, and then, engrafted upon that, subsequent provisions directing the fund to be settled, so as to show that the purpose was, first, to make the gift to and for the benefit of the person named, and then to have the fund settled; in a case of that kind, if the limitations of the proposed settlement are such as cannot become operative the first absolute gift is held to take effect without restriction. So, if you find a clear gift followed by words which affect to divest it, and the limitations over are inoperative, then

(1) 1 H. & M. 36. (2) 1 H. & M. 41.

the Court will uphold the gift, striking out the limitations which cannot have any legal effect. But if the words of the original gift are coupled with the whole series of limitations over, so as to form one system of trusts, then all that can be done is to give effect to so much of the limitations as may be consistent with law. The question is, to which of these two classes the instrument under consideration belongs. The trusts declared by the deed of appointment are, first, 'to appropriate one-fifth of the principal to and for the benefit of' each of the daughters, exclusively of the other children; and if these words stood alone, they would suffice to vest the absolute interest in the five daughters; but the clause runs on thus, 'and to pay and apply the interest, dividends, and annual proceeds of each such one-fifth part or share unto or permit the same to be received by each and every of the said several children for her own sole and separate use; and upon trust from and after the decease of each such daughter to pay, apply, and dispose of the said fifth part or share of such daughter so dying unto and amongst the children of such daughter, and then follow the limitations, which are clearly bad." There the learned Vice-Chancellor held that the daughters took a life interest only.

Now the question is, within which class does the present case fall? *Rucker* v. *Scholefield* (1) was a case where the earlier part of the gift, if standing alone, would have given an absolute interest, but it was held to be cut down by the series of trusts which followed it. From what was said in *Rucker* v. *Scholefield* (2), coupled with Lord Cottenham's statement in *Lassence* v. *Tierney* (3) and Lord Davey's statement in *Hancock* v. *Watson* (4), it appears to me that the Court has first to construe whether there was an absolute gift of one-fifth to each son, or whether there was a direction to appropriate a share to enable it to be held on the trusts declared. I think the latter is the true view. It is difficult to say that the testator intended an absolute gift of these shares by a clause which says: "The shares are not to vest

(1) 1 H. & M. 36.
(2) 1 H. & M. 41.
(3) 1 Mac. & G. 561, 562.
(4) [1902] A. C. 22.

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absolutely in the sons or their representatives." Whether they survived him or not, a share was to be appropriated for the benefit of each of the sons of the testator, or their issue. Then there is a direct provision that the shares are not to vest in the sons or their representatives, but are to be held on a series of trusts which do not exhaust the events. That fact cannot in the circumstances have the effect of preventing the appropriated shares being of a non-vesting character.

For these reasons I am of opinion that there was not an absolute gift in the first instance of the appropriated shares, and the rule in *Hancock* v. *Watson* (1) and *Lassence* v. *Tierney* (2) does not apply, and there will be a declaration that upon the true construction of the will, and in the events which have happened, the share of the residuary trust fund directed to be appropriated to F. G. Payne was undisposed of by the will.

Solicitors: *Dennes, Lamb & Drysdale; James Turner & Son.*

(1) [1902] A. C. 14. (2) 1 Mac. & G. 551.

P. J. B.

498. Also [1948] 1 Ch. 284.

WILLIAMS *v.* BARTON.

RUSSELL J.

[1926. W. 1831.]

1927

April 6, 7, 13.

Trustee—Stockbroker's Clerk—Making Profit out of Trusteeship—Commission on Business introduced—Liability of Trustee to account to Trust Estate.

The defendant, one of two trustees of a will, was employed as a clerk by a firm of stockbrokers on the terms that his salary should consist of half the commission earned by the firm on business introduced by him. At the recommendation of the defendant the firm was employed to value his testator's securities. The firm's charges were paid out of the testator's estate and, in accordance with their contract with the defendant, they paid to him half the fees so earned. The defendant took no part in making the valuations or in fixing the fees to be charged. In an action by his co-trustee claiming that the defendant was bound to treat the fees so paid to him as part of the testator's estate :—

Held, that it was the defendant's duty as a trustee to give the estate the benefit of his unfettered advice in choosing stockbrokers to act for the estate, but, as the recipient of half the fees earned by the firm on business introduced by him, it was to his interest to choose his firm to act. The services rendered to the firm by the defendant remained unchanged but his remuneration for them was increased, and increased by virtue of his trusteeship. That increase was a profit which the defendant would not have made but for his position as trustee, and he was therefore bound to treat it as part of the estate of his testator.

WITNESS ACTION.

The facts were stated in the judgment as follows :—

"This is an action by one of the two trustees of a will against his co-trustee, by which it is sought to make the defendant accountable to the trust estate for moneys received by him from a firm of stockbrokers. The basis of the claim is that in retaining such moneys the defendant is making a profit out of his trusteeship.

The defendant was formerly a stockbroker, but ceased to be a member of the Stock Exchange in 1919. In 1920 he entered the employ of a firm of stockbrokers, George Burnand & Co., and has continued in such employment to the present time. The terms of his employment are that, on his side, he is bound to give the firm his services in connection with Bank of England transfer work ; on the firm's side, they agree to pay him half the commission earned by

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the firm on all such work introduced by him to the firm as the firm is willing to carry out.

On the death of the testator, Sir John Roper Parkington, in 1924 it became necessary to have his securities valued, and it was at first proposed to employ for this purpose a firm of stockbrokers who had usually acted for the testator, but at the instigation of the defendant George Burnand & Co. were in fact employed to do the work. On the subsequent death of the tenant for life a similar valuation became necessary and was in fact done by George Burnand & Co.

For the work so done the stockbrokers charged fees which were paid to them out of the testator's estate, and, in accordance with their contract with the defendant, they paid over to him one-half of the fees so earned and paid to them. The defendant took no part in making the valuations or in fixing the fees to be charged. It is claimed by the plaintiff that the moneys so paid over to the defendant and any half commission which may have been paid to him in respect of sales and purchases of trust investments must be paid to the estate."

Spens K.C. and *R. M. Pattisson* for the plaintiff. The defendant is a trustee and is not entitled to make a profit; he is not allowed to put himself in a position where his interest and duty conflict: *Bray* v. *Ford.* (1) The defendant's salary depends upon the amount of business introduced by him. By virtue of his position as trustee the defendant has introduced to his firm the business of the trust estate and has thereby increased his profit. Where a person has the management of property as a trustee he is not entitled to get any personal profit by availing himself of his position: *In re Duke of Cleveland's Settled Estates* (2); Underhill on Trusts, 8th ed., p. 173. The defendant cannot retain for his own benefit the half commission paid to him by his firm for the introduction of this business, but is bound to treat it as part of the testator's estate.

Gavin Simonds K.C. and *F. McMullan* for the defendant.

(1) [1896] A. C. 44, 51 (2) [1902] 2 Ch. 350.

The sum paid to the defendant is remuneration earned by him as a clerk and not as a trustee, and therefore he is not liable to account. In the case of *In re Dover Coalfield Extension, Ld.* (1), it was held that the remuneration received by C., who was a trustee for the Dover company of his director's qualifying shares in the Kent company, was for work done as director of the Kent company and was not profit received by him from the use of the Dover company's shares, and therefore he was not liable to account for such remuneration. So here the remuneration paid to the defendant was for work done by him for his firm. In the *Dover* case, as in this, the trustee indirectly made a profit out of his trust, because he could not have earned his salary unless he had held the shares as a trustee.

Cur. adv. vult.

April 13. RUSSELL J. [after stating the facts]. It is a well established and salutary rule of equity that a trustee may not make a profit out of his trust. A person who has the management of property as a trustee is not permitted to gain any profit by availing himself of his position, and will be a constructive trustee of any such profit for the benefit of the persons equitably entitled to the property. On the same principle a trustee has no right to charge for his time and trouble. The rule is thus stated by Lord Herschell in *Bray* v. *Ford* (2): "It is an inflexible rule of a Court of Equity that a person in a fiduciary position . . . . is not, unless otherwise expressly provided, entitled to make a profit; he is not allowed to put himself in a position where his interest and duty conflict." It was argued on behalf of the defendant that the case was altogether outside that rule of equity, because the sums received by the defendant were merely parts of his salary paid to him by his employers under the contract of service and were not of a character for which he was liable to account.

The point is not an easy one and there is little, if any, authority to assist in its determination. The situation is an

(1) [1908] 1 Ch. 65. (2) [1896] A. C. 44, 51.

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unusual one and the contract of service presents the following peculiar features. The remuneration has no relation to the services, which the defendant has to render to his employers. The defendant, while bound to render the services, might get no remuneration at all if he introduced no work, or introduced none which was acceptable to his employers. The amount of his remuneration depends (subject to his employers' acceptance of orders) upon his own efforts, but upon efforts not in relation to the work which he is engaged to do. Any increase of his remuneration rests with him.

From this it seems to me evident that the case falls within the mischief which is sought to be prevented by the rule. The case is clearly one where his duty as trustee and his interest in an increased remuneration are in direct conflict. As a trustee it is his duty to give the estate the benefit of his unfettered advice in choosing the stockbrokers to act for the estate: as the recipient of half the fees to be earned by George Burnand & Co. on work introduced by him his obvious interest is to choose or recommend them for the job.

In the event that has happened they have been chosen, and chosen because the defendant was a trustee, with the result that half of what the estate pays must necessarily pass through them to the defendant as part of his remuneration for other services rendered, but as an addition to the remuneration which he would otherwise have received for those self-same services. The services rendered remain unchanged, but the remuneration for them has been increased. He has increased his remuneration by virtue of his trusteeship. In my opinion this increase of remuneration is a profit made by the defendant out of and by reason of his trusteeship, which he would not have made but for his position as trustee.

Much reliance was properly placed on the decision of the Court of Appeal in *In re Dover Coalfield Extension, Ld.* (1), but that case seems to me very different. At the request of the Dover company Mr. Cousins had entered into a contract with the Kent company to serve them as a director, the Kent company paying him remuneration for his services. The

(1) [1908] 1 Ch. 65.

necessary qualification shares were provided by the Dover company, and in respect of those shares he became a trustee for the Dover company. He had not, however, used his position as a trustee for the purpose of acquiring his directorship. He had, in fact, been appointed a director before he became a trustee of the shares. The profit which he gained was not procured by him by the use of his position as trustee, but was a profit earned by reason of work which he did for the Kent company and which would not have been earned by him had he not been willing to do the work for which it was the remuneration. It was not (as in the present case) a profit acquired solely by reason of his use of his position as trustee and a profit in respect of which no extra services were rendered.

The plaintiff is entitled to the declaration asked for. If necessary, an inquiry must be directed, but if the amount can be agreed it may be inserted in the order and an order made for the payment of the agreed amount.

Solicitors : *Parker & Thomas ; Ellis & Willes and Ingpen & Armitage.*

J. B. B. M.

In re LEIGH'S SETTLED ESTATES (No. 2).

[1927. L. 356.]

Trust for Sale—Trustees for Sale subject to jointure Rentcharge—Trustees approved by the Court—"Immediate binding trust for sale"—Effect of Order under Settled Land Act, 1884 (47 & 48 *Vict. c.* 18), *s.* 7—*Settled Land Act*, 1925 (15 *Geo.* 5, *c.* 18), *ss.* 1, 3—*Law of Property Act*, 1925 (15 *Geo.* 5, *c.* 20), *s.* 2, *sub-s.* 2; *s.* 29, *sub-s.* 4—*Law of Property (Amendment) Act*, 1926 (16 & 17 *Geo.* 5, *c.* 11), *ss.* 7, 8, *Schedule.*

Under a testator's will Mrs. T. became entitled as tenant in tail of the settled land subject only to a jointure rentcharge of 1500*l.* appointed by a deceased tenant for life to his widow under a power in the will. On her marriage in 1923 Mrs. T., being then still an infant, obtained an order of the Court approving her marriage and authorizing her execution of three deeds. By the first Mrs. T. disentailed, and by the second conveyed the settled land (subject to the jointure) to trustees upon trust for sale (with power to postpone) and to stand possessed of the net

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proceeds of sale and the rents and profits until sale upon the trusts of a settlement of even date, which was the third deed. Under this settlement the income of the proceeds of sale and the rents and profits until sale were applicable in paying life annuities of 5000*l.* to Mrs. T., 1000*l.* to her husband, 3500*l.* to the jointress, and in paying the balance to Mrs. T. during her life. In 1924 and 1925 two orders were made under the Settled Land Act, 1884, s. 7, which together gave Mrs. T. power to exercise all the powers of a tenant for life under the Settled Land Acts, 1884 to 1890:—

Held (1.), that the approval of trustees contemplated by the Law of Property Act, 1925, s. 2, sub-s. 2, as amended by the Law of Property (Amendment) Act, 1926, Schedule, need not be an ad hoc approval for the purposes of sale, but includes such approval as was expressed or was to be inferred from the order of the Court approving the settlement made on Mrs. T.'s marriage, and therefore that this sub-section applied to this case.

(2.) That by virtue of s. 2, sub-s. 2, as amended, the land was subject to an "immediate binding trust for sale," and was not settled land within the Settled Land Act, 1925.

(3.) That Mrs. T. was by virtue of s. 29, sub-s. 4, of the Law of Property Act, 1925, entitled to exercise the powers conferred by the orders made under the Settled Land Act, 1884, s. 7, but must exercise them in the names and on behalf of the trustees for sale.

ADJOURNED SUMMONS.

By his will dated May 22, 1860, Capel Hanbury Leigh, a testator who died on September 28, 1861, devised his freehold estates in the counties of Monmouth, Glamorgan and Brecon and elsewhere (subject to a prior limitation of a term of 1000 years upon trusts long since satisfied), to the use of his son, John Capel Hanbury Leigh, during his life with remainder to his said son's first and every other son successively in tail general with remainder to his said son's first and every other daughter successively in tail general with divers remainders over. The testator gave power to any tenant for life in possession to appoint to his widow a jointure rentcharge not exceeding 1500*l.* per annum, issuing out of and charged upon the settled lands. John Capel Hanbury Leigh (afterwards John Capel Hanbury) survived the testator, and on January 7, 1885, appointed to his wife, Mrs. Hanbury, for her life, and if she survived him, a yearly rentcharge of 1500*l.* to be charged upon all the settled lands.

John Capel Hanbury had two children—namely, a son, who died on August 9, 1908, at the age of fourteen years,

and the respondent, Ruth Julia Margarette Tenison (hereafter called Mrs. Tenison), who was born on February 16, 1903, and intermarried with the respondent Gerald Eric Farquhar Tenison (hereafter called Mr. Tenison) on December 18, 1923.

By an order of the Chancery Division made on December 3, 1923, the Court had approved the marriage and authorized the execution by Mrs. Tenison (although a minor) of the three deeds next mentioned. On December 17, 1923, Mrs. Tenison, being then still unmarried, executed a disentailing assurance, as the result of which she became entitled in fee simple to the settled lands, subject only to the yearly rentcharge of 1500*l.* Then by a conveyance of the same date she conveyed the settled lands unto and to the use of the trustees, who (by clause 4) were to hold the same upon trust for sale but with power to postpone sale, and so that during Mrs. Tenison's life any sale should be made only with her consent. In the same deed Mrs. Hanbury covenanted with the trustees that if on or in connection with any sale under the trust for sale they should desire her to concur therein and to execute any deed for the purpose of releasing the property from her jointure rentcharge, she would do so at their cost, but only upon the terms that her jointure rentcharge should attach and become charged on the proceeds of sale and the investments for the time being representing the same. By clause 5 it was provided that the trustees should hold the net proceeds of any sale under the trust for sale and also the rents and profits until sale upon the trusts and subject to the powers and provisions declared by a deed of settlement of even date. By this deed of settlement it was declared that the trustees should stand possessed of the net money to arise from any sale made under the trust for sale contained in the conveyance of even date upon trust for investment and to apply the income of the trust fund so created first, in paying to Mrs. Tenison during her life, without power of anticipation, a net yearly sum of 5000*l.*, secondly, in paying to Mr. Tenison a net yearly sum of 1000*l.*, thirdly, in paying to Mrs. Hanbury a net yearly sum of 3500*l.*, and fourthly, in paying the

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remainder of the income to Mrs. Tenison during her life without power of anticipation. After the death of Mrs. Tenison, and subject to the annuities of Mr. Tenison and Mrs. Hanbury, the trustees were directed to hold the trust fund upon trusts for the benefit of Mr. and Mrs. Tenison's issue. Pending the sale of the property comprised in the conveyance of even date, the net rents and profits were to be applied upon the same trusts as were declared concerning the income of money arising from sales under the trust for sale.

By an order of the Chancery Division made by Tomlin J. on April 15, 1924, in the matter of the compound settlement created by the testator's will, the disentailing deed, the conveyance and the settlement, it was ordered that Mrs. Tenison should be let into possession and receipt of the rents and profits of the settled lands, and trustees of the compound settlement were appointed. It was further ordered, pursuant to the Settled Land Act, 1884, s. 7, that the powers conferred upon a tenant for life by ss. 6 to 13 of the Settled Land Act, 1882, should be exercisable by Mrs. Tenison. By a further order of Tomlin J. on January 20, 1925, it was ordered, pursuant to the same section, that the power of sale and other powers conferred on a tenant for life by the Settled Land Acts, 1882 to 1890, should also be exercisable by Mrs. Tenison.

In *In re Leigh's Settled Estates* (*No.* 1) (1) Tomlin J. decided on June 2, 1926, that the settled land was subject to a compound settlement consisting of the will, the disentailing deed, the conveyance and the settlement, and that Mrs. Tenison had the powers of a tenant for life of the compound settlement conferred on her by the Settled Land Act, 1925, s. 20, sub-s. 1 (viii.), as the land was not "subject to an immediate binding trust for sale," by which was meant a trust for sale immediately exercisable so as to overreach all prior equitable charges.

This summons was taken out by Mrs. Tenison, asking:—

(1.) Whether notwithstanding the amendments to the Settled Land Act, 1925, and the Law of Property Act, 1925,

(1) [1926] Ch. 852.

made by the Law of Property (Amendment) Act, 1926, the applicant still had under the Settled Land Act, 1925, s. 20, sub-s. 1 (viii.), the powers of a tenant for life in possession under that Act in relation to the settled estates;

(2.) Whether by reason of the respondent's trustees having been approved by the Court when the three several deeds of December 17, 1923, were settled and approved by the Court and by reason of the amendment made to the Law of Property Act, 1925, s. 2, sub-s. 2, by the Law of Property (Amendment) Act, 1926, the settled estates had ceased to be settled land within the meaning of the Settled Land Act, 1925, and were subject to an immediate binding trust for sale under which the trustees were the proper persons to sell.

(3.) In the event of its being determined that the estates were subject to an immediate binding trust for sale, whether Mrs. Tenison could under the Law of Property Act, 1925, s. 29, sub-s. 4, and consequent upon the orders of April 15, 1924, and January 20, 1925, exercise the powers conferred on the trustees for sale by the above Act in the names and on behalf of the trustees.

Bennett K.C. and *H. T. Method* for Mrs. Tenison. Since *In re Leigh's Settled Estates* (*No.* 1) (1) was decided, the Law of Property (Amendment) Act, 1926, has been passed, and the question arises whether the amendments have affected the position. The material amendments are those which add to the Settled Land Act, 1925, s. 1, a new sub-s. 7, and amend s. 3 and the Law of Property Act, 1925, s. 2, sub-s. 2. The Settled Land Act, 1925, s. 1, defines settlements, and by the new sub-s. 7 "this section does not apply to land held upon trust for sale." Sect. 3, which prescribes the duration of a settlement of land, has added after "land" the words "not held upon trust for sale." In both these cases "trust for sale" must having regard to the definition section mean an immediate binding trust for sale. The Law of Property Act, 1925, s. 2, sub-s. 2, as amended, raises the difficulty. The sub-section as amended seems to contemplate a trust for sale that is otherwise incapable of overreaching a prior

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interest being made to overreach when the trustees have particular qualities. But if that be the true view "trust for sale" in s. 2, sub-s. 2, is given a different meaning from that contained in the definition section (s. 205, sub-s. 1 (xxix.)).

[TOMLIN J. This seems to be a case where the context makes a different meaning necessary.]

In the present case the execution of the three deeds by Mrs. Tenison on her marriage while still an infant was authorized by the Court, and on this occasion the trustees were approved. It will be contended therefore that s. 2, sub-s. 2, as amended applies here, and that the effect of it is to convert the trust for sale into an immediate binding trust for sale within the meaning of the Settled Land Act, 1925, s. 20, sub-s. 1 (viii.). It is suggested that s. 2, sub-s. 2, does not have this effect. Even though it confers on the trust for sale a capacity it did not possess before of overreaching the prior equitable interest, that does not convert the trust for sale into an immediate binding trust for sale, although it has the same effect as an immediate binding trust for sale.

Further there has been in the case a vesting deed, and the legal estate is vested in Mrs. Tenison. If that be so s. 2, sub-s. 2, is inapplicable.

Vaisey K.C. and *Tillard* for the trustees. The effect of the Law of Property Act, 1925, s. 2, sub-s. 2, as amended, is to make the settled estates in the case subject to an "immediate binding trust for sale." That expression was stated in the judgment in *In re Leigh's Settled Estates* (*No.* 1) (1) to mean "a trust for sale capable of overriding all prior charges." That is exactly the quality conferred on a trust for sale falling within s. 2, sub-s. 2. It must follow that a trust for sale satisfying the provisions as to trustees in s. 2, sub-s. 2, is an immediate binding trust for sale.

The question remains whether s. 2, sub-s. 2, applies here. It is said that it does not, because the legal estate is in Mrs. Tenison, but the contention rests on a misconception.

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The Law of Property (Amendment) Act, 1926, is by s. 8, sub-s. 2, to be treated as passed on January 1, 1926; it follows that the law has to be considered as having existed in the amended form on that date. Further the vesting of the legal estate was in no way dependent on the vesting deed, which was merely declaratory, but on the effect of the Law of Property Act, 1925, First Schedule, Part II., in automatically vesting the legal estate. If at that date the land was settled land within the Settled Land Act, 1925, it vested in the tenant for life (First Schedule, Part II., paras. 3, 5 and 6 (*c*)), but if it was excluded from that Act by reason of being subject to an immediate binding trust for sale it vested in the trustees for sale (paras. 3, 6 (*b*)).

Again, the trustees were approved by the Court within s. 2, sub-s. 2. It is submitted that the sub-section does not require an ad hoc approval. That would be to give an unduly restricted meaning to the sub-section, having regard to the fact that it is sufficient that the trustees should be a trust corporation or the successors of trustees appointed or approved by the Court.

It remains to consider the effect of the orders of April 15, 1924, and January 20, 1925, having regard to the Law of Property Act, 1925, s. 29, sub-s. 4. On the view that s. 2, sub-s. 2, converts the trust for sale in this case into an immediate binding trust for sale, the land has ceased to be settled land within the Settled Land Act, 1925, having regard to s. 1, sub-s. 7. If so it is difficult to see how Mrs. Tenison can exercise the powers conferred on a tenant for life by the Settled Land Act. There are no powers for her to exercise.

Bennett K.C. in reply. The Law of Property Act, 1925, s. 2, sub-s. 2, as amended, contemplates a case where the legal estate is in the trustees for sale, and that was not so here, because it had become vested in Mrs. Tenison pursuant to the earlier decision. Again, for s. 2, sub-s. 2, to apply, the trustees must have been approved ad hoc. That is the only reasonable construction having regard to the Legislature's intention to protect the equitable interests to be overreached.

Cur. adv. vult.

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April 5. TOMLIN J. delivered the following written judgment:—

The principal facts of this case will be found set out in *In re Leigh's Settled Estates* (*No.* 1) (1), and it is unnecessary for me to state them again. As the result of the decision in that case, the trustees on July 16, 1926, executed a vesting deed declaring that the legal estate in fee simple was vested in the applicant, Mrs. Tenison, whom I had held to have the powers of a tenant for life under a compound settlement. The question which I have now to determine is as to the effect of the Law of Property (Amendment) Act, 1926, which received the Royal Assent on June 16, 1926, after my former decision, but which by s. 8, sub-s. 2, thereof provides that its provisions (with the exception of certain sections not material to this case) "shall be deemed to have come into operation on the 1st day of January, 1926." Sects. 7 and 8 of the amending Act are the relevant sections, and s.7 enacts as follows: "The amendments specified in the second column of the Schedule to this Act, being amendments of a minor nature, shall be made in the enactments mentioned in the first column of that Schedule, and shall have effect without prejudice to any title acquired by a purchaser, or any registration effected, before the passing of this Act." Sect. 8, sub-s. 1, is: "This Act may be cited as the Law of Property (Amendment) Act, 1926, and so far as it amends any Act shall be construed as one with that Act"; and sub-s. 2 is: "The provisions of this Act except ss. 4 and 5 shall be deemed to have come into operation on the 1st day of January, 1926." By the Schedule to the Act there are made (inter alia) certain amendments to ss. 1 and 3 of the Settled Land Act, 1925, and certain amendments to s. 2 of the Law of Property Act, 1925. Sect. 1 of the Settled Land Act, 1925, determines what constitutes a settlement. The amending Act adds a sub-section in these terms: "(7.) This section does not apply to land held upon trust for sale." Sect. 2 of the Settled Land Act, 1925, remains unaltered, and enacts as follows: "Land which is or is deemed to be the subject of a settlement

(1) [1926] Ch. 852.

is for the purposes of this Act settled land, and is in relation to the settlement referred to in this Act as the settled land." Sect. 3 of the Settled Land Act, 1925, prescribes the duration of the settlement in the case of land which has been subject to a settlement. The amending Act inserts after the word "land" the words "not held upon trust for sale." Sect. 2, sub-ss. 1 and 2, of the Law of Property Act, 1925, so far as they are material to this case, originally read as follows: Sub-s. 1: "A conveyance to a purchaser of a legal estate in land shall overreach any equitable interest or power affecting that estate, whether or not he has notice thereof, if"—and then the second condition of affairs to which the "if" applies is as follows—if "the conveyance is made by trustees for sale and the equitable interest or power is at the date of the conveyance capable of being overreached by such trustees under the provisions of sub-s. 2 of this section or independently of that sub-section, and the statutory requirements respecting the payment of capital money arising under a disposition upon trust for sale are complied with." Sub-sect. 2 is as follows: "Where the legal estate affected is not, when the equitable interest or power is created, subject to a trust for sale or a settlement, then, if the estate owner, whether before or after the commencement of this Act, disposes of his estate to trustees upon trust for sale, and at the date of a conveyance made, after such commencement, under the dispositions upon trust for sale, the trustees (whether original or substituted) are either: (*a*) two or more individuals approved or appointed by the Court or the successors in office of the individuals so approved or appointed; or (*b*) a trust corporation, such equitable interest or power shall, notwithstanding any stipulation to the contrary, be overreached by the conveyance, and shall, according to its priority, take effect as if created or arising by means of a primary trust affecting the proceeds of sale and the income of the land until sale." As amended by the amending Act, the second sub-section now reads thus: "Where the legal estate affected is subject to a trust for sale, then if at the date of a conveyance made after the commencement of this Act under the trust for sale or the powers

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conferred upon the trustees for sale, the trustees (whether original or substituted) are either (*a*) two or more individuals approved or appointed by the Court or the successors in office of the individuals so approved or appointed; or (*b*) a trust corporation, any equitable interest or power having priority to the trust for sale shall, notwithstanding any stipulation to the contrary, be overreached by the conveyance, and shall, according to its priority, take effect as if created or arising by means of a primary trust affecting the proceeds of sale and the income of the land until sale."

Having regard to the alterations of the law, how can a title now be made to the land comprised in the relevant instruments? I come to the following conclusions upon the construction of the Acts: first, that "trust for sale" in the new sub-s. 7 of s. 1 of the Settled Land Act, 1925, and in s. 3 of the same Act as now amended, must be read as meaning an immediate binding trust for sale; secondly, that trust for sale in sub-s. 2 of s. 2 of the Law of Property Act, 1925, as amended is not confined to an immediate binding trust for sale, as otherwise there would be no point in the sub-section. Regard must be had to the fact that definitions apply subject to the qualification, "unless the context otherwise requires." Thirdly, that the approval of trustees contemplated by the sub-section is not confined to an ad hoc approval for the purposes of sale, but includes such an approval as is expressed in or is to be inferred from the order of the Court made on December 3, 1925, approving the settlement made on Mrs. Tenison's marriage; and fourthly, that where there is an approval or appointment of trustees by the Court within the sub-section the trust for sale is then capable of operating in relation to the whole subject-matter of the settlement, and (assuming that it is an immediate trust for sale) becomes an immediate binding trust for sale within the definition of that phrase in the Settled Land Act and the Law of Property Act.

Now, having regard to the view I have expressed above, I think that the amending Act has rendered this land no longer subject to a settlement within the meaning of s. 1 of

the Settled Land Act, 1925, and as the amending Act is to be deemed to have come into operation on January 1, 1926, the vesting deed executed by the trustees must, I think, be regarded for the purposes of the future as having had no effect.

The question, however, still remains, what is the effect of s. 29 of the Law of Property Act, 1925, having regard to my orders made on April 15, 1924, and January 20, 1925, giving Mrs. Tenison leave to execute the powers of a tenant for life including the power of sale? Sect. 29 reads as follows: "(1.) The powers of and incidental to leasing, accepting surrenders of leases and management, conferred on trustees for sale, whether by this Act or otherwise, may, until sale of the land, be revocably delegated from time to time, by writing, signed by them, to any person of full age (not being merely an annuitant) for the time being beneficially entitled in possession to the net rents and profits of the land during his life or for any less period; and in favour of a lessee such writing shall, unless the contrary appears, be sufficient evidence that the person named therein is a person to whom the powers may be delegated, and the production of such writing shall, unless the contrary appears, be sufficient evidence that the delegation has not been revoked. (2.) Any power so delegated shall be exercised only in the names and on behalf of the trustees delegating the power. (3.) The persons delegating any power under this section shall not, in relation to the exercise or purported exercise of the power, be liable for the acts or defaults of the person to whom the power is delegated, but that person shall, in relation to the exercise of the power by him, be deemed to be in the position and to have the duties and liabilities of a trustee. (4.) Where, at the commencement of this Act, an Order made under s. 7 of the Settled Land Act, 1884, is in force, the person on whom any power is thereby conferred shall, while the Order remains in force, exercise such power in the names and on behalf of the trustees for sale in like manner as if the power had been delegated to him under this section." The question, however, still remains: what is the effect of

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that section ? I have already in part construed this section in *In re Lady Francis Cecil's Settlement Trusts.* (1) I think the purpose of the section was to preserve as nearly as possible the position of a tenant for life who, when the Act came into force, was exercising powers by virtue of an Order made under s. 7 of the Settled Land Act, 1884. I do not think that the force of that section has been in any way diminished by the amending Act of 1926. Although the amending Act may have deprived Mrs. Tenison of her position as tenant for life under the Settled Land Act, 1925, it has not in my judgment robbed her of the benefit of s. 29 of the Law of Property Act, 1925. There is, in my opinion, nothing in the contention that there are no powers which she can exercise, because the land is no longer subject to a settlement. The answer is that s. 29 enables her to sell, but only by exercising, so far as form is concerned, the powers of the trustees under their trust for sale.

I shall make a declaration to the effect that in the events which have happened the estates are now subject to an immediate binding trust for sale, but that the applicant can, under s. 29, sub-s. 4, of the Law of Property Act, 1925, in the names and on behalf of the trustees, sell the estates.

The costs of all parties as between solicitor and client must come out of the estate.

Solicitors : *Foyer, White, Borrett & Black.*

(1) [1926] W. N. 138.

H. C. G.

FRIERN BARNET URBAN DISTRICT COUNCIL *v.* ADAMS AND OTHERS.

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[1926. F. 1072.]

Practice—Writ—Names and Addresses of Dependants—Action by Local Authority to recover Expenses of making up Road—Adjoining Owners unknown—Defendants described as "owners of certain lands adjoining" the Road—Vagueness—Bad Writ—Rules of Supreme Court, Order II., *r.* 3, *Appendix A, Part* 1—*Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *ss.* 257, 267.

The plaintiffs, being entitled under the provisions of the Public Health Acts to recover the expenses of making up a road from the owners of the lands abutting on the roadway and being unable to discover who some of those owners were, issued a writ against the defendant A., a known owner of some of the land, "and the owners of certain lands adjoining" the road "more particularly described in the endorsement" on the writ "whose names and addresses are not known to the plaintiffs." Upon the summons for directions the plaintiffs desired to amend the writ by adding after the word "owners" the words "at the time of the completion of the works referred to in the endorsement hereon," and they also asked for leave to effect substituted service on the defendants so described by affixing copies of the writ on the respective premises:—

Held, that the writ in not giving the names and addresses of the defendants other than A. did not comply with the form of writ which had the basis of statutory authority and was prescribed by Order II., r. 3, and Appendix A, Part 1, of the Rules of the Supreme Court; that the writ, whether as originally issued or as proposed to be amended, was bad as against the persons so sought to be made defendants; and that the words following A.'s name must be struck out.

Decision of Clauson J. affirmed.

APPEAL from an order of Clauson J. in the following circumstances:—

In May, 1923, the appellant council had made up a road within their jurisdiction, called Alexandra Road, and in November, 1925, their surveyor made his apportionment of the expense so incurred among the owners of the lands abutting on the road, who became liable therefor by virtue of s. 257 of the Public Health Act, 1875.

One of the plots of land abutting on the road belonged to the defendant Adams, but the appellants could not find out who were the owners of many of the other plots, and they

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issued a writ against Adams "and the owners of certain lands adjoining Alexandra Road, Friern Barnet, more particularly described in the said endorsement hereon whose names and addresses are not known to the plaintiffs."

On the summons for directions the plaintiffs desired to amend the writ by adding after the word "owners" the words "at the time of the completion of the works referred to in the endorsement hereon," so as to comply with the provisions of s. 257. The Master referred the matter to Clauson J. in chambers, who directed it to come on as an ex parte motion in Court. The defendant Adams had entered an appearance to the writ but, not being concerned with the question relating to the other defendants, had given notice that he would not take part in the motion.

At the hearing of the motion the plaintiffs asked for leave to amend the writ in the manner mentioned above, and to effect substituted service on the other defendants indicated in the writ as proposed to be amended by affixing copies of the writ on the respective premises in question.

Clauson J. refused to allow the amendment, and struck out of the writ all the words after the name "Adams" on the ground that there was no power to issue a writ against a number of vague, unnamed and unknown defendants.

The plaintiffs appealed ex parte to the Court of Appeal. The appeal was heard on December 13, 1926.

Owen Thompson K.C. and *R. A. Glen* for the appellants. These repairs come within s. 19 of the Public Health Acts Amendment Act, 1907, which gives the appellants the benefit of ss. 257 (relating to a charge on the premises) and 267 (dealing with service of notices) of the Public Health Act, 1875. The latter section relates to "notices, orders and any other documents" required to be served under the Act, and "other documents" which if the premises are vacant can be served by being fixed on some conspicuous part of the premises, have been held to extend to a summons for criminal proceedings and also summary proceedings for rates. Under s. 257 expenses can be recovered from the person who is the

owner of the premises at the time of the completion of the work in respect of which the expenses are incurred, and it is desired to amend the writ accordingly, for "the owners" simpliciter is too wide and might include persons who were not the owners at completion.

[ATKIN L.J. referred to *Westbury-on-Severn Rural Sanitary Authority* v. *Meredith*. (1)]

The question is whether a writ is good in which the defendant is not described by his Christian name and surname. Order II., r. 3, provides that a writ of summons, except as otherwise provided, shall be in one of the forms in Appendix A, Part 1., "with such variations as circumstances may require." We submit that it is sufficient for a good writ in the High Court if the defendant is a person who exists and is designated; and that the Christian name or surname is not a necessary part of the description of a man if he is so described that he can be found. In *Harrington* v. *Bytham* (2) no name was used, but the defendants were described as "the assignees and personal representatives of Sarah Bytham, deceased," and the Court held the description sufficient, although s. 168 of the Common Law Procedure Act required the defendant's name to be inserted in the writ. Under Order XLVIII.A, r. 11, a man can be sued in his firm or business name, although it is not his own name. So long as the defendant can be identified, that is sufficient for a good writ.

An incorrect statement of a defendant's address will not vitiate a writ: *Smith* v. *Hammond*. (3) A summons in respect of a nuisance under the Public Health (London) Act, 1891, was held in good form, although addressed to "the owner" of the premises: *Reg.* v. *Mead* (4); and a summons for a general district rate under s. 256 of the Act was held to be a "document" within s. 257, service of which could be made by delivering it to some person on the premises: *Rex* v. *Braithwaite*. (5)

(1) (1885) 30 Ch. D. 387.
(2) (1854) 2 C. L. R. 1033.
(3) [1896] 1 Q. B. 571.
(4) [1894] 2 Q. B. 124.
(5) [1918] 16 L. G. R. 580.

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In *Wealdstone Urban Council* v. *Evershed* (1) the action in the county court to enforce a charge under s. 257 was expressed to be against "the owner" of the property, and an order for substituted service was obtained, but the Divisional Court, while saying that the proceedings were defective, did not decide that the writ was bad. In Admiralty actions "the owners" of the vessel sue and are sued, under that description. We submit that this will be a good writ when amended as asked.

LORD HANWORTH M.R. This is an application which raises an important point to those concerned in the administration of local government. The application is made on behalf of the Urban District Council of Friern Barnet, and made by way of appeal from an order of Clauson J. dated November 23, 1926.

Within the jurisdiction of this Urban District Council there was land which had not been built upon, but in respect of which expense had been incurred for making up a roadway. There was then the right, on the part of this Urban District Council, to demand that the sums which they had expended should be repaid by the owners of land abutting on this road. By s. 257 of the Public Health Act, 1875, it is directed that "where any local authority have incurred expenses for the repayment whereof the owner of the premises for or in respect of which the same are incurred is made liable under this Act or by any agreement with the local authority, such expenses may be recovered, together with interest at a rate not exceeding five pounds per centum per annum, from the date of service of a demand for the same till payment thereof, from any person who is the owner of such premises when the works are completed for which such expenses have been incurred, and until recovery of such expenses and interest the same shall be a charge on the premises in respect of which they were incurred. . . . ." Now the facts are that these works in respect of the highway were completed in May, 1923, and it appears that the surveyor made his

(1) (1905) 3 L. G. R. 722; 69 J. P. 258.

apportionment in November, 1925. No counter notice was served by the persons on whom the apportionment was made within three months of the service thereof, and so the apportionment stands good, and the apportioned amounts became a charge on the premises of the various owners. The difficulty arose however in this, that although the sum expended could be recovered from the adjoining owners, it was not known who those owners were at the time when the works were completed. To get over that difficulty, and to prevent these expenses from falling, as they would do, on the ratepayers generally of that district if the money expended was not returned to the coffers of the council, the Urban District Council issued this writ against, first a Mr. Adams, who is not concerned, and therefore gave notice that he would not take part in these proceedings, and also against "the owners of certain lands adjoining Alexandra Road, Friern Barnet, more particularly described in the endorsement hereon whose names and addresses are not known to the plaintiffs." Now it was pointed out that the owners comprised in that description need not necessarily be the owners of the premises at the time when the work was completed, and so on the summons for directions it was desired to amend the writ by adding after the word "owners" the words "at the time of the completion of the works referred to in the endorsement hereon." That amendment would have put the plaintiffs right on one particular point, because it would have indicated the date at which the owners were to be ascertained. Clauson J. declined to allow the amendment to be made, and struck out all the words after the name "Adams," on the ground that there was no power to issue a writ against a number of vague, unnamed, unknown defendants.

The application before Clauson J. was ex parte upon the return of the summons for directions, and the plaintiffs have now appealed ex parte to this Court. They also asked for leave to be given them to effect substituted service on those persons indicated in the latter portion of the writ by affixing copies of the writ on the particular premises respectively. Before any question of substituted service arises we have

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to determine, first, whether this is a good writ as originally drawn, or whether it would be a good writ if the proposed amendment were allowed? I think that Clauson J. was perfectly right. A writ cannot be issued in the terms proposed referring to the parties sought to be summoned in this vague way. I think that that is clear from the rules and the official forms. Tracing the matter a little further back the original official form of writ in use was established by the Act of 2 Will. 4, c. 39. That Act recited that "whereas the process for the commencement of personal actions is by reason of its great variety and multiplicity very inconvenient in practice," and proceeded to enact that the process in all such actions should be according to the form contained in the Schedule to the Act annexed marked No. 1, and which process should be called a writ of summons. In the form of the writ in the Schedule the writ is directed to C. D. of, etc., in the County of . . . . .

That form was followed in the Judicature Act, 1873, and it is to be found now in the forms directed to be used in Order II., r. 3, which directs that "the writ of summons for the commencement of an action shall, except in the cases in which any different form is hereinafter provided, be in one of the Forms Nos. 1, 2, 3 and 4 in Appendix A, Part 1, with such variations as circumstances may require," and the appendix shows that the writ must be directed to a particular defendant of a specified address. In my opinion, this writ does not comply with the form of writ which has the basis of statutory authority. It is said that in other cases a writ in an indefinite form is allowed, and we have been referred to a form of writ used in the Admiralty Division, in pursuance of Order II., r. 7, in which a writ is allowed to be directed to "the owners of the. . . . ." But I do not think that the plaintiffs gain any assistance from that rule and the forms which accord with it, because this particular writ and their remedy in this case do not fall within that exceptional rule. They fall within the general rules applicable to parties to an action, and no special procedure of any kind can be applied in these proceedings by the plaintiffs to help them out of their difficulty.

Our attention has also been called to cases of nuisance in which a summons under the Public Health Act was said to be properly served if it were delivered to some person upon the premises, but that again does not help the plaintiffs, because the answer to that is that the proceedings in those cases were in respect of a nuisance, for which special provision is made under the Public Health Act, or the Public Health (London) Act, and also because we are not now considering the mode of service of the writ, but whether the writ per se was a good one. For the reasons which I have given, it seems to me that the writ is shown not to be in the statutory form, or indeed in any known form, and that it is bad. In my judgment Clauson J. was right, and this application must be refused.

ATKIN L.J. I agree. It appears to me that the procedure established by the Judicature Act necessarily implies even if it does not expressly state—and I think it does so state—that it is necessary to an action that the defendants should be named. In some cases they may be described by the office which they hold, but apart from that, they must be named; and it seems to me to be contrary to the rules to issue a writ against defendants whom you do not know by describing them merely as owners of certain property. It is not right to describe the defendants in the vague way adopted in this writ. I know of no such procedure except in the Admiralty Division, but if permissible in certain cases there, it would, I think, be a complete departure from all precedent to allow that sort of thing in any other Division to enforce a personal claim. When local authorities were given power by s. 255 of the Public Health Act, 1875, to commence proceedings relating to nuisances without mentioning the defendants' names, that was a special procedure provided for a particular purpose. If Mr. Glen could have produced an authority for similar proceedings to enforce a charge of this nature, he would have gone a long way; but he has not done so. I have no doubt that the local authority can establish the liability of the adjoining owners

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and that they can establish the existence of a charge, but when they seek to enforce that charge by an action at law, they must proceed in the ordinary way and conform to the ordinary rules of procedure.

In the circumstances it seems to me that this application, which is a bold experiment, must fail. We sympathize with the difficulty in which this Urban District Council are placed, and no doubt it is to the disadvantage of the public that these plots should be allowed to remain derelict without the council having power to collect the amount due, but some other remedy must be found which does not strain the ordinary procedure of the Courts. A writ bad in its form cannot overcome the difficulty.

I would refer to *Westbury-on-Severn Rural Sanitary Authority* v. *Meredith* (1), which apparently decided that a charge for less than 10*l.* in value cannot be established in an action in the Chancery Division. That is a further matter for the consideration of the plaintiffs.

In my judgment Clauson J. was quite right in striking out these unnamed defendants, and the application must be dismissed.

LAWRENCE L.J. I also agree that the application fails. There are no special provisions under s. 257 for enforcing a charge, and therefore the plaintiffs have only the ordinary remedies which are prescribed by the Court.

This is a writ in personam, and in my opinion, the writ, in not naming the defendants, but merely describing them as the owners of adjoining property, is bad. The plaintiffs do not know, and the writ does not state, whether any one of the defendants is a lunatic, or an infant, or is residing abroad, or is under any kind of disability, in each of which cases some special directions or some special procedure might be required.

There is no authority or precedent for such a writ, and counsel was unable to tell us of any case where a writ of this sort has been allowed. The only case at all like the present is *Wealdstone Urban Council* v. *Evershed* (2), where a plaint

(1) 30 Ch. D. 387. (2) 69 J. P. 258, 263.

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in a county court was issued describing the respondents in somewhat the same manner as in the present case. That case ultimately came before the Divisional Court, and Lord Alverstone C.J., in holding that the form of the plaint was bad, stated that counsel had "very fairly said there is no authority or precedent for it, that he knows of, even in the High Court, and in the case of absent owners, or anything of that kind, I should have thought the case would not have been so launched by the local authority, because this is not new legislation; it is now nearly sixty years since the original Public Health Act, and I should have thought there must have been many cases in which the local authority would have had such a claim." That statement applies with even greater force twenty years later, and if such proceedings could have been properly commenced by a writ in this form, I should have thought that there would long ago have been some authority in support of it.

I agree that this application must fail.

Appeal dismissed.

Solicitors for the appellants: *Beckingsales & Naylors.*

R. M.

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[1924. B. 2223.]

Tithes—City of London—Rate prescribed by stat. 37 *Hen.* 8, *c.* 12, *and Decree thereunder—Customary Payment—Payment of less Sum than prescribed Rate—Onus of Proof.*

By the statute 37 Hen. 8, c. 12, passed in 1545 intituled "An Act for Tithes in London" and a decree made thereunder, which by the statute was declared to have the force of an Act of Parliament, it was directed that the tithes of the City of London should be computed at the rate of 2*s.* 9*d.* upon every 20*s.* and at 1*s.* 4½*d.* upon every 10*s.* of the rent of the premises in respect of which tithes were payable, but by cl. 18 of the decree it was provided that where less sums had been accustomed to be paid for tithes, tithes only after such accustomed rate should be paid.

In an action brought by the owners of tithes in respect of the premises No. 15 Great St. Helen's, Bishopsgate, against the occupiers thereof for tithe at the prescribed rate, the defendants pleaded that the sum

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of 4*s.* 9*d.* a quarter or 19*s.* per annum was accustomed to be paid for tithes in respect of the premises at and before 1545, the date of the decree, and claimed the benefit of the exemption contained in cl. 18 of that decree:—

Held (affirming the decision of Tomlin J.), that the onus lay on the defendants of proving that in 1545 there was a customary or accustomed payment for tithe in respect of their premises of a certain sum less than 2*s.* 9*d.* in the pound in order to bring themselves within the exemption in cl. 18.

Warden, &c., of St. Paul's v. *Kettle* (1813) 2 Ves. & B. 1 followed.

Held, also (reversing the decision of Tomlin J.), that although no direct evidence had been given of any such customary sum as that alleged by the defendants having been paid in 1545 or any preceding year, yet it had been proved that during a series of subsequent periods, which though discontinuous extended from 1632 to 1822, a period of over 190 years, payments for tithe had been made in respect of the premises of a certain small invariable amount; that such payments were inconsistent with the premises having been liable from 1545 to tithe at the rate of 2*s.* 9*d.* in the pound and consistent only with their having then been liable to a customary payment of less than that amount, and accordingly that the latter alternative was sufficiently established by the subsequent conduct of tithe owners and tithe payers respectively.

Foster v. *Plumbers' Co.* (Buckley J., Jan. 25, 1900, unreported) followed.

Antrobus v. *East India Co.* (1806) 13 Ves. 9; *Bennet* v. *Trepass* (1723) 2 Gwil. 633; (1725) Gilb. Ch. 191; (1722) 4 Bro. P. C. 650; (1719) Western's Tithe Cas. 125; *Warden, &c., of St. Paul's, London* v. *Morris* (1803) 9 Ves. 155 considered.

Quaere, whether assessments to land tax are admissible as evidence of the rental value of the premises out of which the land tax is payable.

APPEAL from a decision of Tomlin J.

The plaintiffs were the executors of the will of Mary Busby, who died on December 7, 1918, and as such were the owners of all the rectorial or freehold tithes issuing out of or payable for or in respect of such parts of No. 15 Great St. Helen's, in the City of London, as were situated in the parish of St. Helen's, Bishopsgate.

The defendants had for various periods since March 25, 1921, held and occupied portions of No. 15 Great St. Helen's, all of which were situated in the parish of St. Helen's, Bishopsgate.

The tithes were payable under and by virtue of the statute 37 Hen. 8, c. 12, and a decree made thereunder. The statute was intituled "An Act for Tithes in London" and was

passed in the year 1545 with the object of putting an end to the controversies which had arisen between the parsons, vicars and curates in the City of London and its citizens and inhabitants as to the payment of tithes. By the decree, which was declared by the statute to have the force of an Act of Parliament, the tithes in the City of London were to be computed at the rate of 2*s.* 9*d.* upon every 20*s.* and at 1*s.* 4½*d.* upon every 10*s.* of the rent of the premises in respect of which tithes were payable. But by cl. 18 of the decree it was provided: "That where less sum than after sixteen pence half-peny in the ten shillings rent, or less sum than two shillings nine pence in the twenty shillings rent, hath been accustomed to be paid for tithes; that then in such places the said citizens and inhabitants shall pay but only after such rate as hath been accustomed."

The plaintiffs claimed to recover as from March 25, 1921, tithes at the rate of 2*s.* 9*d.* for every 20*s.* or 1*s.* 4½*d.* for every 10*s.* of rent. The defendants alleged that the sum of 4*s.* 9*d.* a quarter, or 19*s.* per annum, was accustomed to be paid for tithes in respect of No. 15 Great St. Helen's at and before the date of the decree, and they admitted liability to that extent only, and paid into Court the sum of 3*l.* 6*s.* 6*d.* to answer the tithes at that rate from March 25, 1921, to the commencement of the action.

The case was tried before Tomlin J., who on November 26, 1926, decided it in favour of the plaintiffs. In the course of a considered judgment his Lordship held that the onus of proving that a less sum than 2*s.* 9*d.* in the pound was paid in 1545 in respect of the premises lay upon the defendants. He then considered the documentary evidence put in by the defendants to support their case, beginning with the decree dated February 9, 1662, in a suit by Sir John Langham, and a book produced from the archives of the Vestry of Great St. Helen's referring to the decree, and said that the proper inferences to be drawn from the material seemed to him to be: (1.) That the extent of the liability to tithe of the property had been a matter of doubt over a long period; and (2.) that the tithe owner and the tithe payer had from

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time to time accommodated their differences by temporary arrangements. In the face of what was actually proved and of the above inferences, it was not possible to infer that during the periods when there was no evidence of payment, 19*s.* per annum was paid rather than some other sums, and still less possible to infer that the 19*s.* represented some sums or apportioned parts of other sums aggregating 19*s.*, which were themselves certain sums of less than 2*s.* 9*d.* in the pound accustomed to be paid in 1545. The result was that the action succeeded. The judgment would be prefaced by a declaration that the defendants were liable to pay tithe in respect of No. 15 Great St. Helen's, at the rate of 2*s.* 9*d.* in the pound, and an account would be directed on the footing of that declaration.

The defendants appealed. The appeal was heard on March 3, 4 and 7, 1927.

Preston K.C. and *Lionel L. Cohen* for the appellants.

G. B. Hurst K.C. and *C. A. Collingwood* for the respondents.

The nature of the evidence adduced and the arguments sufficiently appear from the judgments.

The following authorities were referred to: *Bennet* v. *Trepass* (1); *Warden, &c., of St. Paul's, London* v. *Morris* (2); *Foster* v. *Plumbers' Co.* (3); *Drake* v. *Smyth* (4); *Payne* v. *Esdaile* (5); *Warden, &c., of St. Paul's* v. *Kettle* (6); *Williamson* v. *Gosling* (7); Halsbury's Laws of England, vol. xviii., p. 308, note (*a*); Bourdin's Land Tax, 4th ed., pp. 4–16; Dowell's History of Taxes (1884), pp. 52, 53, 82, 83; Adam Smith's Wealth of Nations, Bk. V., ch. 2, Part II., art. 1; Cox's Annals of St. Helen's, Bishopsgate, p. 127.

Cur. adv. vult.

March 25. The following written judgments were delivered:—

LORD HANWORTH M.R. This is an appeal by the defendants from the judgment of Tomlin J., who on November 26, 1926,

(1) 2 Gwil. 633; Gilb. Ch. 191; 4 Bro. P. C. 650; Western's Tithe Cas. 125.
(2) 9 Ves. 155.
(3) Buckley J., Jan. 25, 1900. Unreported.
(4) (1818) 5 Price, 369.
(5) (1888) 13 App. Cas. 613.
(6) 2 Ves. & B. 1.
(7) (1762) 2 Gwil. 902.

made a declaration that the defendants were respectively liable to pay to the plaintiffs, as the persons entitled thereto, tithes in respect of No. 15 Great St. Helen's leased to, or occupied by, them respectively, so long as they remained lessees or occupiers of those premises at the rate of 2*s.* 9*d.* in the pound on the annual rent paid by them as prescribed by the Act of Parliament, 37 Hen. 8, c. 12, and a decree made thereunder, and ordered consequential accounts to be taken. By this Act a liability to pay tithes is imposed upon the citizens and inhabitants of premises in the City of London referred to in the Act, at the rate above specified, unless the defendants can establish that they have brought themselves within the exemption provided under cl. 18 of the decree made in accordance with, and under the powers of, the Act. No question is raised against the plaintiffs' title to be paid tithe, nor as to the defendants' occupation of No. 15 Great St. Helen's, nor as to those being premises to which the Act prima facie applies. The question to be determined is whether the defendants have proved that there was a customary payment of 19*s.* within the meaning of the Act so as to induce the protection of the exemption under cl. 18.

The appellants formally took the point that the onus of proving that they were exempt did not lie upon them; but in my judgment it is clear that this onus does lie upon the appellants—who were defendants to the action—and it was so held by Lord Eldon L.C. in *Warden, &c., of St. Paul's* v. *Kettle.* (1) If they fail to discharge this onus they are liable for the full 2*s.* 9*d.* in the pound: *Antrobus* v. *East India Co.* (2)

It is necessary to examine the Act 37 Hen. 8, c. 12, carefully. It was passed in 1545 for the purpose of putting an end to the controversies and quarrels, which had been frequent, between the parsons, vicars and curates in the City of London and its citizens and inhabitants as to the payment of tithes, and which an Act passed in 1535 had failed to appease. By its terms the decree to be made by the Archbishop Cranmer and six of the Privy Councillors

(1) 2 Ves. & B. 1. (2) 13 Ves. 9.

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and judges named, was to have the force of an Act of Parliament. The state and division of the properties in respect of which tithes were payable was stabilised as it had been eight years before the decree was passed. Clause 18 is as follows: "Provided also, and it is decreed, That where less sum than after sixteen pence half-peny in the ten shillings rent, or less sum than two shillings nine pence in the twenty shillings rent, hath been accustomed to be paid for tithes; that then in such places the said citizens and inhabitants shall pay but only after such rate as hath been accustomed." The presence of this proviso for exemption in the decree makes it plain that it was contemplated that there were cases to which it would apply. In other words, it need cause no surprise to find that in the case of premises in respect of which 2*s.* 9*d.* in the pound otherwise would be payable, there was in existence a customary payment at a lower figure. Indeed it is stated in the judgment in *Bennet* v. *Trepass* (1), decided in 1723, that less sums than at the standard rate of 2*s.* 9*d.* in the pound have been paid by almost every parishioner to the parson, "and therewith they (the parsons) have been content." Further, the Court in that case (2) held the construction of the statute to be that if there had been an agreement to pay tithes for eight years past before 1545 on a particular scale, such payments were to be treated as "accustomed" payments within the statute. From this it would seem that the proof of an accustomed payment was not a matter of extreme difficulty.

There is no evidence as to what was paid before or near to the time when the Act was passed. The first record is an entry in an old parish account book, produced from proper custody, which has entries of accounts and payments relating to tithes. The book does not appear to be an account book kept regularly year by year; but one containing records of accounts, receipts, payments and charges deemed worthy of record. On folio 124 there is a list of the names of the parishioners "who have paide five years Tythe beforehand beginninge at Christmas anno 1632." Among them is Thomas

(1) 2 Gwil. 633, 639. (2) 2 Gwil. 640.

Jeninges, who paid at the rate of 35*s.* per annum—8*l.* 15*s.*—in respect of his house in Great St. Helen's.

The next piece of evidence is from the year 1654. It appears from an entry in this same parish book that Thomas Jeninges was in that year charged at 8*s.* 9*d.* per quarter for his house—that is 35*s.* a year. That entry was made from an exhibit in the proceedings which were instituted by Sir John Langham, the then owner of the tithes, against the parishioners of Great St. Helen's, who had pretended that the sums paid by them were customary payments, and "were less than what is due and payable by the said decree—which yet they refused to discover." Those proceedings were to compel "the confederates" to set forth and discover the true rents of their said houses, shops, etc.; and "to the end the certain duty or sum of money in lieu of the said tithes by the said confederates might be discovered, and that the times and manner of paying the same, and that the same might be settled and decreed by this Honourable Court."

A settlement of the proceedings was reached upon the required information being forthcoming from each of the defendants as to the "certain rates and customary payments . . . . for his own messuage or tenement or such part and proportion of any capital messuage or tenement which he holdeth and enjoyeth as the same is now divided." The decree of the Court of Exchequer is dated February 9, 1662. The entry in the parish book of St. Helen's is made as a "Tithe book for St. Helen's Parish," and taken from the decree of the Court of Exchequer. In the book, there is the record that the tenement in respect of which Thomas Jeninges paid 35*s.* a year was one of five houses, which have been subsequently altered into six houses. It is accepted that upon this division being made, the quota payable by Henry Durley, the successor of Jeninges, was 19*s.*—part of the 35*s.*—and it is not disputed that Durley was the predecessor of the defendants, and that his house is now represented by what is known as No. 15 Great St. Helen's. The entry in the parish book brings the evidence of payment of this 19*s.* down to 1705. There is proof of a record or table made in

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December, 1714, for the general use of the parish that this customary payment for this house was then 4*s*. 9*d*. per quarter, that is 19*s*. per annum. That record was treated as authoritative in 1795, when 100 copies of the original were printed. The vestry order of October 8, 1795, is "that 100 copies of the Table of the Tythes payable by the Inhabitants of this parish be printed and distributed amongst such inhabitants." There is a misprint of the quarterly amount, which is stated to be 4*s*., not 4*s*. 9*d*. This explains the discrepancy between the 19*s*. and the 16*s*. paid, or said to be payable, at that time. But in 1822 the true figure of 19*s*. once more reappears.

From 1822 to 1834 no payments were made in respect of tithe; and from 1834 to 1871 a sum of 2*l*. was paid by agreement. In that year there was the conveyance of (inter alia) tithe issuing out of, or payable for No. 15 Great St. Helen's to the predecessors in title of the plaintiffs.

It is in my judgment unnecessary to consider in detail the evidence submitted subsequent to the year 1822, for there is relevant evidence of great weight over a long period of years before that date. The question that has to be determined is whether there was a "customary" payment in the year 1545 so as to bring the defendants within the protection of cl. 18 of the decree. If there were no other materials, it might be necessary to consider what happened in the matter of the tithes in the nineteenth century, even though such evidence is the most distant from the sixteenth century.

But taking the evidence earlier in time, there is in my judgment convincing proof that in 1632 down to 1654 tithe was paid on the basis of a customary payment and not on the basis of the rack rent; that in 1705 the appropriate quota of that customary payment was the sum due in respect of tithe from No. 15 Great St. Helen's, and that the same quota was payable or was paid as a customary payment down to 1822.

Thus for 190 years there is evidence which affirms the existence of a customary payment and negatives the payment on a rental basis. From these facts, it is in my judgment right to infer that the customary payment had a true legal

origin: see per Pollock C.B. in *Gibson* v. *Doeg.* (1) Such payment was made "as of right and not in wrong." That means that it existed as a customary payment in respect of the premises at or before the year 1537.

The Court was asked to accept the assessments to the land tax as incidentally proving the rental values of the premises out of which the land tax was payable, by a calculation based upon the rate at which the tax was payable, and the amount paid. Land tax assessments have been admitted as evidence of the assessment upon a person, and for the property named, and as some evidence of occupation: *Doe* v. *Seaton* (2); but as at present advised I hesitate to accept them as evidence of rental value. Such evidence is, however, in my judgment not required. I agree with Tomlin J. that there is no satisfactory evidence of the rental of No. 15 during these centuries; but I differ from him on the point that there is nothing against which he could measure the rate of the annual payments actually proved, and so test the nature of the payments made.

As I have already pointed out, the question is: was there in 1545 a customary payment which at that time fulfilled a specified test?

If there was not a customary payment or one which answered the test, the full amount of 2*s.* 9*d.* in the pound was payable. There is no evidence that a demand for this latter amount has ever been made successfully: there is evidence over 190 years that a customary payment has been made, and that the nature of that payment was that it was "less than what was due and payable by the said decree of 1545." (See the recitals in the decree of 1662.) The decree of the Court of Exchequer in 1662, made by consent of all parties, "ordered adjudged and decreed—that the defendants should pay unto the plaintiffs—the several and respective sums of money according to the several rates and customary payments by them set forth." The basis of the settlement and of the order of the Court was that the sums to be paid were customary payments—that is to say,

(1) (1857) 2 H. & N. 615, 623. (2) (1834) 2 Ad. & E. 171.

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that they satisfied cl. 18 of the decree. I agree with the judgment of the three judges of the Court of Exchequer in *Bennet* v. *Trepass* (1) that the defendants "were not obliged to set up these customary payments as modus's in bar of tithes; for these customary payments are exemptions out of the decree; and therefore in what manner soever they have been paid, if there has been a customary payment since the statute of a lesser sum, they cannot be bound by the decree to pay 2*s*. 9*d*. per pound."

It was on this footing that the Court directed an issue to be tried, and this order was upheld in the House of Lords. (2)

Intrinsically a customary payment is one which is on a scale less than that of 2*s*. 9*d*. in the pound of rental value.

The defendants have proved by evidence "rational and solid," to quote Lord Eldon's phrase in *Warden, &c., of St. Paul's, London* v. *Morris* (3), that there has been a "customary" payment over a very long period of years, and in my judgment that is a customary payment which is within cl. 18 of the decree and thus affords exemption to the defendants from the payment of 2*s*. 9*d*. in the pound and a defence to the plaintiffs' claim. The appeal must be allowed with costs, the order of Tomlin J. must be discharged, and the action dismissed with costs.

SARGANT L.J. In this case I agree with Tomlin J. both on principle and authority that the onus is cast on the defendants of establishing that in the year 1545 there was a customary or accustomed payment for tithe in respect of their premises, No. 15 Great St. Helen's, of a certain sum less than 2*s*. 9*d*. in the pound; and that unless this onus is discharged the plaintiffs are entitled to succeed. It is admitted by the defendants that no direct evidence can be given of any such certain customary sum having been paid in that year or any preceding years. But they allege that during a series of subsequent periods, which though discontinuous extend from the year 1632 to the year 1822, that is over a

(1) Gilb. Ch. 191, 194; 2 Gwil. 633, 640.

(2) 4 Bro. P. C. 650.

(3) 9 Ves. 155, 169a.

period of 190 years, payments for tithe have been made in respect of the premises of a certain small invariable amount, that such payments are inconsistent with the premises having been liable from the year 1545 to tithe at the rate of 2*s.* 9*d.* in the pound, and consistent only with their having then been liable to a customary payment of less than that amount, and accordingly that the latter alternative is sufficiently established by the subsequent conduct of the tithe owners and the tithe payers respectively.

The plaintiffs, on the other hand, while not contesting the general validity of this reasoning, did the facts justify it, contended that the periods for which a constant payment was made were but short; that during a period from 1796 to 1807 there was a variation in payment of 16*s.* annually instead of the previous and subsequent payment of 19*s.*; and that, a question having been mooted in the year 1822 as to the sum properly payable, there were payments made between the years 1834 and 1870 of 2*l.* per annum and from 1871 to 1918 of a much larger sum. And the learned judge has in the result held that there is too much doubt in the whole case to allow him to infer a customary payment in 1545.

A question was raised at the hearing as to the admissibility of the parish tithe books as evidence to show the amounts paid for tithes and the premises in respect of which they were paid. But the learned judge held this evidence admissible, and before this Court its admissibility was conceded. With the aid of this evidence it has been possible to trace the property which is now 15 Great St. Helen's (and which I will hereinafter refer to as No. 15) or the larger property in which it was formerly comprised, on dates beginning in the year 1632; and the result which has been accepted on both sides on the appeal is as stated in the next two paragraphs.

In the year 1632 one Thomas Jeninges paid a sum of 8*l.* 15*s.* for five years' tithes in advance in respect of a larger property comprising No. 15, this payment being at the rate of 8*s.* 9*d.* per quarter. In the year 1654 Thomas Jeninges paid for the same property, the same sum of 8*s.* 9*d.* per

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quarter for tithes. Between the year 1654 and the year 1705 the five houses including Thomas Jeninges' house had been converted into six houses; and by the latter year the tithe payable by the five houses, which amounted to 1*l.* 0*s.* 6*d.* in all, had been re-apportioned between the six houses, so that the same total of 1*l.* 0*s.* 6*d.* was payable by the six houses and that the tithe payable by the house of Henry Durley, which is identified as being now No. 15, was 4*s.* 9*d.* per quarter or 19*s.* a year. This appears from a tithe book specially prepared in the year 1705 by the order of the Vestry of Great St. Helen's from tithe books of the years 1653 and 1654 which had been exhibited in a suit in the Court of Exchequer in the year 1662 between Sir John Langham, the owner of the tithes, and a number of the parishioners of the parish.

Further, it is accepted that this payment of 19*s.* annually continued to be made in respect of No. 15 for some ten years up to and including the year 1714. In that year a resolution of the vestry was passed "that the modes or accounts of the tithes payable quarterly to the Impropriator by the inhabitants of this vestry be transcribed and hung up in the vestry and that the inhabitants at any time may have recourse thereto." The list or table prepared and hung up in accordance with this resolution has been produced and shows that Jane Bowie, who had then become the occupier of No. 15, was liable for a quarterly payment of 4*s.* 9*d.* From that time forward until the year 1796 there is nothing to show what, if anything, was paid for tithe in respect of No. 15, but in 1796 a sum of 4*s.* a quarter only was paid and that payment was continued until the year 1807, when the former payment of 4*s.* 9*d.* was resumed and was then continued until the year 1822.

This intermediate diminished payment of 4*s.*, which at first sight seems against the defendants, is, however, explained in a very curious way. On October 8, 1795, a resolution of the vestry was passed that one hundred copies of the table of the tithes payable by the inhabitants of the parish be printed and distributed amongst such inhabitants. One of the prints in question has been proved, which is in all or almost

all other respects a correct copy of the original table, but as regards No. 15 states, by what is obviously a printer's error, that the tithe payable is 4*s.* instead of 4*s.* 9*d.* quarterly. Further, the ownership of the tithes had changed hands on a sale in the year 1795; and it seems reasonably clear that the purchaser had, during the ensuing twelve years, and until the discovery of the mistake, claimed and received tithe on the basis of the erroneous statement in the print of the old table of tithes. In view of these considerations the fact of the payment of 4*s.* instead of 4*s.* 9*d.* per quarter for these eleven or twelve years, instead of tending against the defendants, seem to me rather to tell in their favour, and to show a recognition during that period also of a liability of No. 15 to a certain customary payment only in respect of tithes, though the actual amount of that payment had been mistaken in consequence of the printer's error above referred to. And it is noticeable that in the particulars used on the sale by auction in 1822 the tithes payable by the then tenant of No. 15, a Mr. Tottie, are stated as being 19*s.* per annum, though it is true that the particulars also contain a statement that such tithes as are not customary payments will be capable of increase.

Down to this point the evidence seems to me overwhelmingly in favour of the defendants. They have established a series of payments which are quite constant, except for variations accounted for exactly either by a sub-division of the property in respect of which the payments were made or by an explicable mistake for a short period on the part of the persons demanding payment. And these payments beginning at a time removed by less than ninety years from the critical year 1545 are, if rightly made, consistent only with the supposition that the property was within the proviso in cl. 18 of the decree made under the Act of Hen. 8 and inconsistent with the alternative supposition of the plaintiffs that the property was outside cl. 18. I adopt on this point the reasoning of Buckley J., as he then was, in his judgment in the somewhat similar case of *Foster* v. *The Plumbers' Co.* (1),

(1) Unreported.

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and add that the facts here are considerably stronger in favour of the defendants than they were in that case, particularly in being carried back to a date twenty-two years earlier. Mr. Hurst, for the respondents, has contended that in order to come within the proviso the appellants must show not only that there was a customary payment in the year 1545 but that the then rental of the property was then 8*l.* or over, so as to make the customary payment less than at the rate of 2*s.* 9*d.* in the pound. Were it necessary for this to be separately proved, I think that there are sufficient materials before us to enable that conclusion to be arrived at. But, in my judgment, it is not necessary, and Mr. Hurst's argument did not appreciate the full force of the inference to be drawn from the evidence of subsequent payment. The inference from these subsequent constant payments is that No. 15 was within the proviso of cl. 18, and was, therefore, liable only to the payments in fact made, and in order that any property should be within the proviso, it must have been subject to a customary payment, which was less than at the rate of 2*s.* 9*d.* in the pound. The inference, therefore, from the subsequent constant payments is that in the year 1545 both conditions of the proviso were satisfied, and that not only was there then a customary payment in respect of the property, which included No. 15, but also that this customary payment was less than 2*s.* 9*d.* in the pound. And this is in fact the view that was taken by Buckley J. in the case already referred to.

But I have still to consider the payments made from the year 1822 onwards, especially as the learned judge seems to attach considerable weight to them as negativing or weakening any presumption that might have been drawn from the regularity of the payments prior to that date. With great respect to him, I am unable to take the same view of these payments, and consider that no real importance is to be attached to them. Some possibility of increasing some of the amounts paid for tithe had been indicated in the conditions of sale in 1822. The payments of 2*l.* per annum from 1834 to 1870 are of course much nearer the former rate of 19*s.* than what would have

been payable, had the proper amount been at the rate of 2*s*. 9*d*. in the pound, and cannot, at the most, indicate more than that some slight doubt was felt in the matter. And the larger payments from 1871 to 1918 were not payments by occupier to tithe-owner, but were payments made by the owners of No. 15 to the owners of the tithe (probably trustees) by way of interest on the sum expended by them in the purchase of the tithe on No. 15 and another house—namely, 10 Great St. Helen's. It is not contended that any agreement or acknowledgment as to the liability of the property is to be inferred from these payments. And made, as they appear to have been, without any such investigation as has now taken place of the history of the matter, they do not, in my judgment, lead to any inference, either favourable or unfavourable to the conclusions to be drawn from this earlier history, as now definitely ascertained.

I agree that the appeal should be allowed with costs.

LAWRENCE L.J. (read by SARGANT L.J.). I agree. The defendants admit that, in this Court at all events, the onus rests on them to prove that at the date when the statute of Hen. 8 was passed there was accustomed to be paid for tithes in respect of No. 15 Great St. Helen's a less sum than 2*s*. 9*d*. in the pound on the annual rental. Owing to the lapse of time the defendants have been unable to adduce any direct evidence as to the sum which was then being paid for tithes, or as to the then rental value of the house in question. They have, however, produced documents which show that payments for tithes were made in the year 1632 and at various later dates, from which they ask the Court to infer that in the year 1545 the sum of 19*s*. was accustomed to be paid for tithes in respect of the building which is now known as No. 15 Great St. Helen's, and that such sum was less than 2*s*. 9*d*. in the pound on the annual rental. The evidence so adduced has established to my satisfaction that the following sums were paid by the occupiers of the site of No. 15 Great St. Helen's for tithes in and since the year 1632—namely, from 1632 to 1705 the sum of 35*s*. per annum,

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from 1705 to 1796 the sum of 19*s.* per annum, from 1796 to 1807 the sum of 16*s.* per annum, from 1807 to 1822 the sum of 19*s.* per annum, from 1834 to 1871 the sum of 2*l.* per annum, from 1871 to 1918 the sum of 12*l.* 7*s.* 1*d.* per annum, and from 1918 to 1921 the sum of 15*l.* per annum. No admissible evidence as to the rental of the house in question earlier than the year 1793 has been adduced. In that year there is a deed which shows that the house was then in lease at a rental of 50*l.* per annum.

Tomlin J. has held that in the face of the varying amounts which have from time to time been paid for tithes the extent of the liability to tithe of the house has been a matter of doubt over a long period, and that the tithe owner and tithe payer have from time to time accommodated their differences by temporary arrangements, and consequently he found it impossible to infer either that 19*s.* was a sum accustomed to be paid in and before 1545, or that such sum if paid was less than 2*s.* 9*d.* in the pound on the annual rent.

In arriving at these conclusions I venture to think that the learned judge has attached too much weight to the fluctuations in the amounts from time to time paid for tithes, and has not taken sufficient account of the reasons which led to these fluctuations. In my opinion the circumstances in which each alteration in the amount paid for tithes has taken place have been satisfactorily explained, and in view of these explanations I do not consider that the inferences drawn by the learned judge from these fluctuations are justified.

It appears that in 1632 the site of the building now known as No. 15 Great St. Helen's was part of the site of a larger house, which formed one of a group of five houses in respect of which group sums totalling 1*l.* 0*s.* 6*d.* per quarter were paid for tithes; the amount paid in respect of the building which included the site of No. 15 being 8*s.* 9*d.* a quarter, equal to 35*s.* a year. It further appears that in 1705 this group of five houses had been converted into a group of six houses, and that on such division some adjustment was made whereby as from the time of this division 4*s.* 9*d.* per quarter, equal to 19*s.* a year, became payable for tithe

in respect of No. 15, but the total sum of 1*l.* 0*s.* 6*d.* a quarter in respect of the whole group of six houses remained the same as it had been before the division. The reduction from 19*s.* a year to 16*s.* was apparently the result of a printer's error in the printed list of 1796, which error remained undiscovered until the Rev. Edward Cooke bought the tithes in 1807, after which date the mistake was rectified and the sum of 19*s.* was again paid. The payment of 2*l.* per annum from 1834 to 1871 was apparently the result of a compromise agreement between the tithe owners and the then occupying tenant named Chapman. The inference which I draw from this agreement is that the tithe owner made a claim for 2*s.* 9*d.* in the pound on the rent paid in respect of the house which claim was resisted by the tenant who, however, was unwilling to embark upon what might prove to be heavy and costly litigation for such a small amount and therefore agreed to pay 2*l.* (which was less than one-third of the amount payable on the basis of 2*s.* 9*d.* in the pound on the rent) rather than go to law. However that may be, the plaintiffs in the present action are not willing to abide by the compromise of 1834, and therefore the parties are relegated to their former rights, and the period during which the 2*l.* was paid may be eliminated.

What really happened in 1871 is left in doubt. Apparently in that year George Robert Bengough purchased from the trustees of the will of the former owner the tithes in respect of Nos. 10 and 15 Great St. Helen's for the sum of 250*l.* G. R. Bengough was one of the trustees who then owned the freehold of these two houses, but he seems to have paid the money for the tithes out of his own pocket, and thereafter the trust estate, or some or one of his beneficiaries apparently paid an annual sum amounting at first to 12*l.* 7*s.* 1*d.* and later to 15*l.* (either by way of interest on the purchase money or by way of tithe) to G. R. Bengough and to the persons claiming under him. I need not go further into the particulars of the legal effect of this transaction, as in my opinion it has no bearing on the question which has now to be determined, and the payment made thereunder cannot help

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to solve the problem as to whether there was a customary payment for tithes in 1545.

The result of the evidence therefore is that during the relevant period from 1632 to 1822, that is to say, for nearly two centuries, a fixed sum of 19*s.* per annum was in substance paid for tithes by the occupiers of what is now No. 15 Great St. Helen's. In my judgment this fact takes the defendants' case out of the region of mere conjecture and leads irresistibly to the inference that the 19*s.* was a customary payment within the meaning of cl. 18 of the decree made under the statute of Hen. 8. The payment of this small fixed sum for such a long period, commencing only seventy-two years after the passing of the statute, is in my opinion inexplicable except upon the basis that it was a customary payment within the meaning of cl. 18 of the decree, and in my judgment affords cogent evidence of that fact: which evidence is not in my opinion displaced or weakened by the absence of evidence as to the actual rental value of the property during the earlier part of the period.

For these reasons I am of opinion that the appeal ought to be allowed with costs, and the action dismissed with costs.

Appeal allowed.

Solicitors for appellants: *Waterhouse & Co.*
Solicitors for respondents: *Peacock & Goddard.*

W. I. C.

In re UNITED GENERAL COMMERCIAL INSURANCE CORPORATION, LIMITED.

C. A. 1927 Jan. 12, 20.

[00361 of 1923.]

Insurance—Employers' Liability Insurance Business—Deposit—Policies issued in London against Risks Abroad—Company carrying on "employers' liability insurance business outside the United Kingdom"—Dominant Factor—Place of Contract not Place of Risk—Claims in respect of Accidents Abroad entitled to rank against Deposit—Liquidation—Assurance Companies Act, 1909 (9 *Edw.* 7, *c.* 49), *ss.* 1 (*d*), 2, 33, *sub-s.* 1 (*i*).

An insurance company registered under the Companies Acts and having its head office in London, issued policies to the applicant, a British subject, under the foreign trade name used by him for the purposes of the undermentioned business, insuring him against liability to pay compensation or damages to workmen, mainly French and Belgian, employed by him in breaking down ammunition at ammunition dumps in France and Belgium. The policies were issued from the company's head office, were in English terms and subject to English law, and the premiums were to be paid in sterling in London. At the time of the order for winding up the company compulsorily, claims to the amount of 9132*l.* in respect of accidents covered by the policies in question had arisen, and the assured claimed to rank pari passu with the other holders of employers' liability insurance policies against the deposit of 20,000*l.* made under s. 2 of the Assurance Companies Act, 1909:—

Held, that the locality where the risk and loss arose did not dominate the company's employers' liability insurance business which, in the circumstances, had its origin and was transacted in London, so as to make it a business carried on "outside the United Kingdom" within the meaning of s. 33, sub-s. 1 (*i*), of the Act and deprive the assured of the benefit of the Act; and that the assured was entitled to rank against the deposit of 20,000*l.* pari passu with the other holders of employers' liability insurance policies.

Decision of Eve J. reversed.

APPEAL from Eve J.

The following statement of facts is taken from the considered judgment of the Master of the Rolls:—

"This is an appeal from an order dated October 26, 1926, by Eve J. in the winding up of the above corporation, whereby he refused an application made by summons before him to review the rejection of the proof of Messrs. F. N. Pickett et Fils. This latter name is the trading name used by Francis Norman Pickett, who is a British subject, carrying on

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business in London at 22 Queen Anne's Gate as an engineer, in respect of business carried on by him in France and Belgium. It appears that shortly after the Armistice, November 11, 1918, which brought the hostilities in the Great War to a close, Mr. Pickett entered into contracts with the British, French and Belgian Governments for the purchase of ammunition dumps lying in France and Belgium, and engaged in breaking down ammunition at those dumps as a commercial proposition. For the purpose of dealing with certain of the dumps, Mr. Pickett secured offices at the Hôtel de Paris at Wimereux in France, and adopted the trading name above mentioned; but he remained the sole proprietor of the business.

The workpeople engaged at the dumps were mostly French and Belgian subjects, with Englishmen in charge of them. The work involved somewhat hazardous risks, and in order to cover his liability to pay compensation to the workpeople employed by him for accidents arising out of their employment Mr. Pickett insured with Lloyd's Underwriters through the agency of Messrs. L. Aldridge & Co., Ld. On December 9, 1919, the above named corporation was incorporated, and thereafter the risks were transferred through the same agency to the corporation, who issued ten policies in all to cover them. The policies were for a definite period, and were successively renewed. Those under which the claim in question is made are policies covering the period from November 1, 1920, to July 4, 1921, and claims in respect of accidents covered by the policies to the amount of 9132*l.* have arisen.

On June 19, 1923, a compulsory order to wind up the corporation was made, and on November 29, 1923, Sir William McLintock, K.B.E., was appointed liquidator. On September 3, 1925, Messrs. F. N. Pickett et Fils lodged a proof in respect of the above claims. In due course the liquidator issued a notice requiring creditors who had claims against the deposit of 20,000*l.* made in accordance with s. 2 of the Assurance Companies Act, 1909 (9 Edw. 7, c. 49), to give notice thereof to him in writing, and accordingly

Mr. Pickett made a claim that the amount of his claim and proof was payable, pari passu with other proper claims under other policies of employers' liability insurance, out of the deposit. That claim was not admitted by the liquidator. Thereupon a summons to review the decision of the liquidator was taken out by Mr. Pickett dated in February, 1926, and, as already indicated, dismissed with costs by Eve J. on October 26, 1926. The ground of the rejection of the proof of the claims was that the corporation in accepting the risks and issuing the policies relied upon, was carrying on employers' liability insurance business outside the United Kingdom, and therefore that such business in accordance with the terms of s. 33, sub-s. 1 (*i*), of the Act of 1909 'is not to be treated as part of the employers' liability insurance business carried on by the company for the purposes of the Act.' Eve J. upheld that contention.

It is therefore necessary to examine closely the nature and quality of the business in which the corporation engaged with Mr. Pickett. The application for the policies was made to the head office of the corporation in London. The policies were issued at the head office in London, and each bore the stamp required under the Stamp Act, and were signed by directors in London. They were obtained through the agency of Messrs. L. Aldridge & Co., Ld., a company with its registered office in London. Notices of the claims were sent to the London office in accordance with one of the conditions appearing upon the policies issued which provides: 'Every notice or communication to be given or made under this policy shall be delivered in writing at the Head Office of the Corporation,' that is at Old Jewry in the City of London. The premiums were to be paid in sterling in London.

Shortly put, the contract of insurance is thus a contract made in London and by condition 8 is subject to British law. If and so far as any communication or investigation or inquiry originated, or was made in France or Belgium, it was to or by an agent acting for principals in London, and not for or under any office or company or person abroad who had any authority to act, except such as was given from London.

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The places where the risks might arise were situated in France or Belgium; but so far as the contract was constituted between the assured and the insurers, it was in London.

It is not irrelevant to note that if an insurance office carries on business abroad—in France or Belgium—it must fulfil the regulations of the laws of those countries. These regulations require: (*a*) the registration of the insurance company in France or Belgium; (*b*) the making of a deposit; and (*c*) the appointment of an 'administrateur délégué' approved by an official of the Government. Otherwise the insurance company is not recognized by the French or Belgian Courts. No such steps had been taken when the policies in question were issued, although later the corporation became authorized to carry on business in France."

The assured appealed. The appeal was heard on January 12, 1927.

Stuart Bevan K.C. and *Cecil Turner* for the appellants. These policies were issued in the United Kingdom and everything which had to be performed under them was done in this country, although the accidents insured against were to happen abroad. The assured was an Englishman carrying on trade in France under the name of "F. N. Pickett et Fils." During the currency of the policies the claims were sent to the London office. Before the expiration of the policies Aldridge established himself at Boulogne and then in Paris, and although the corporation asked Pickett when a claim was made to forward it to Aldridge to save time, the mode of notifying claims did not affect the position. This corporation was never registered in France or Belgium and had no locus standi in the Courts of those countries. The whole question turns upon the construction of s. 33, sub-s. 1 (*i*), of the Assurance Companies Act, 1909, "if the company carries on employers' liability insurance business outside the United Kingdom," and s. 33, sub-s. 1 (*d*), removes any difficulty as to the meaning of carrying on business. The effect of the section is that if a company outside the United Kingdom issues or undertakes liability under policies insuring against

employers' liability, that business will be treated as outside business for the purposes of the Act. This corporation is not caught by the modifications to s. 33, because the place is not the place of the risks, but the place of the contract which, in this case, was the United Kingdom. Whatever the risks, this corporation was carrying on this business in London. Our contention is supported by the Form in Sch. I. of the Act. Sect. 1 shows that "transacts" and "carries on" assurance business are interchangeable terms, and that throws light upon the meaning of "transact" in Sch. I.

[They referred to *Cornish Mutual Assurance Co.* v. *Inland Revenue Commissioners* (1) and *In re Padstow Total Loss and Collision Assurance Association.* (2)]

S. L. Porter K.C. and *Swords* for the respondent liquidator. The Act contains special provisions for employers' liability insurance, which, no doubt, is due to the fact that employers' liability rests on a statutory basis. A firm for working dumps is formed abroad under a foreign name and all negotiations by it are in a foreign name and the risks insured against are risks in a foreign country, and we submit that all those factors constitute the transacting of business abroad. It would be narrowing the meaning of the provisions of the Act to say that because in those circumstances and for those purposes it issues policies in London, an insurance corporation is not carrying on business abroad.

The true meaning of s. 33, sub-s. 1 (*i*), is that foreign employers' liability insurance should be excluded and that would cover this case of what is purely a French insurance; and further, the real object of the Act involves a broader principle—namely, to provide for a fund which shall support the statutory liability created by the laws of this country; and it is difficult to see why the Act should provide a fund for supporting the insurance of workmen other than workmen in the United Kingdom. That distinction affords a reasonable line of demarcation; and we submit that on the true construction of the Act, business outside the United Kingdom means

(1) [1926] A. C. 281. (2) (1882) 20 Ch. D. 137.

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business in respect of risks incurred abroad in respect of workmen outside the United Kingdom.

Turner in reply.

Cur. adv. vult.

Jan. 20. LORD HANWORTH M.R. stated the facts as above set out and continued: The act of issuing the policies above mentioned is in my judgment the "carrying on" or "transacting" business: see per Sir George Jessel M.R. in *In re Padstow Total Loss and Collision Assurance Association.* (1) It may be that colloquially, the office might describe the business entered into in reference to risks abroad, as foreign business, as contradistinguished from home business; but that does not in my judgment alter the essential nature of the business which is entered into and transacted by the contracts made, which were London contracts. Any negotiation in reference to them as to their terms or conditions or as to losses claimed for under them must be determined at the head office.

By s. 1 (*d*) of the Act of 1909, employers' liability insurance business is defined as "The issue of, or, the undertaking of liability under, policies insuring employers against liability to pay compensation or damages to workmen in their employment." It will be noticed that under this definition no emphasis is laid upon the locality of the employment; but it is the issue of, or undertaking of liability under policies that is primarily indicated as connoting the business of employers' liability insurance. This definition—for such it amounts to—must be borne in mind when s. 33, sub-s. 1 (*i*), is considered. It is difficult to suggest that there is any difference in meaning between "transacting" and "carrying on" business, and the words of the last paragraph of s. 1 are as follows: "A company registered under the Companies Acts which transacts assurance business of any such class as aforesaid in any part of the world shall for the purposes of this provision be deemed to be a company transacting such business within the United Kingdom"; although these words are to be taken, subject, as respects any class

(1) 20 Ch. D. 137, 143, 144.

of assurance business, to the special provisions of the Act relating to business of that class—in other words, in the present case, subject to s. 33, sub-s. 1.

Upon the facts therefore of the present case at the time when the policies were issued and current, it does not appear in my judgment, that the corporation was carrying on employers' liability insurance business outside the United Kingdom so as to bring into effect s. 33, sub-s. 1 (*i*), of the Act. I regret to find that my conclusion differs from that of Eve J. Although I share the same view that he expresses as to the similarity, in effect, of the terms "transact" and "carry on," I take a different view of the nature of the business of the insurance company. To my mind emphasis must be laid on the making and terms of the contract under which the relation between the insured and the corporation was established; the locality where the loss arises does not dominate the business, which had its origin in London and the purpose of which was to give the security of, or indemnity under, an English contract, in respect of claims which might arise elsewhere.

For these reasons the appeal will be allowed with costs, here and below, and the liquidator will be ordered to admit the proof of Messrs. F. N. Pickett et Fils for the amount of their claims.

SARGANT L.J. The sole question here is whether the business represented by the nine policies of insurance issued to the applicant under his foreign trade style of "F. N. Pickett et Fils" was business within s. 33, sub-s. 1 (*i*), of the Assurance Companies Act, 1909. That is to say, did the company in the course of transacting this business carry on employers' liability insurance business outside the United Kingdom? Eve J. has answered this question in the affirmative, and accordingly has declined to declare that the claims under these policies are payable, pari passu with other claims under other policies of employers' liability insurance, out of the deposit made by the company in respect of employers' liability insurance business.

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It is clear that the company did not at the time of the issue of these policies, or indeed at any time, carry on any general employers' liability insurance business outside the United Kingdom. One, and only one, such policy, in addition to those now in question, is alleged by the liquidator to have been issued by the company; and he does not in any way differentiate the circumstances under which this additional policy was issued from those present here. It is true that, so far as the constitution of the company was concerned, the company had power to carry on this class of business abroad, and that the directors at one time contemplated starting a branch office in France, but this intention was never carried out, nor indeed were steps taken to comply with the requirements of the French law in the matter. The liquidator has referred in para. 10 of his affidavit to certain other policies issued by the company to the applicants and others in France; but these were policies of marine, fire, accident, and general insurance, and have obviously no bearing at all on the present question.

The policies themselves were issued from the head office of the company in London in pursuance of cover notes previously forwarded by the agents of the company in London, Messrs. L. Aldridge & Co., Ld. The premiums were stated in English money and were apparently paid in London, the terms of the contract were expressed in English and included a clause under which all differences would be determined in accordance with English law. The only suggestion that the business in connection with these policies was business carried on outside the United Kingdom is derived from the facts that the name of the assured is "F. N. Pickett et Fils" (which was, however, the applicant's trade name in connection with the dumps in question), and that the risks against which the assured was indemnified were risks of having to pay compensation for injury to workmen employed in France or Belgium in accordance with the laws of those countries.

I cannot attach any real importance to the description in the policies of the applicant by his trade name in France

and Belgium; nor did the learned judge apparently do so. His decision is founded solely on the fact that the risks insured against were in relation to workpeople outside the United Kingdom, and that, to use his own words, "business which affects workpeople outside the United Kingdom" is business transacted abroad within the meaning of the Act. This view is not, in my judgment, satisfactory. The definition of employers' liability business in s. 1 (*d*) of the Act is quite general in its terms, has no special reference to the liability of employers under the English statutes on the subject, and is in my view as applicable to claims by workmen against employers under foreign legislation as under our domestic legislation. It is common knowledge that English insurance companies undertake risks whether in connection with life assurance, fire insurance or accident insurance (all of which forms of insurance are also defined in s. 1) with foreigners as well as with our own subjects; and I see no reason to think that the operation of s. 1 (*d*) is less extensive than that of s. 1 (*a*), (*b*) or (*c*). No doubt it is often convenient, when such business with foreigners becomes or is likely to become extensive, to facilitate such transactions by establishing foreign agencies; and then the companies would, in respect of the business transacted through such agencies, be rightly held to be transacting or carrying on business outside the United Kingdom. But this has no relation to the nationality of the assured or to the locality of the risks insured against, but simply depends on the locality where the transactions of insurance are effected. For instance, contracts of assurance with Englishmen in relation to their lives or any property or business of theirs in the United Kingdom would, I think, constitute a carrying on of business outside the United Kingdom if effected through any branch office outside the United Kingdom of an English insurance company.

Nor, when the provisions under s. 33 of the Act which specially relate to employers' liability insurance business are carefully examined, do I find any such distinction indicated as is drawn by the learned judge. The terms of s. 33, sub-s. 1 (*i*), in their natural meaning refer, in my judgment,

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to the place where the business of insurance is carried on, not to the place where risks are run and the liability insured against originates. I can find no suggestion in the section or in the Schedules to the Act that premiums paid to an English office are to be apportioned and carried to different liability funds according to the locality of the risks run. But on the view taken by the learned judge such an apportionment would be necessary in the case, for instance, of policies insuring employers against claims by English or foreign sailors, where the policies issued were not, as in s. 33, sub-s. 1 (*b*), incidental only to marine policies. And, while there is no difficulty in giving effect to s. 33, sub-s. 1 (*i*), if what is referred to is the place where a company may actually carry on business, I see great difficulty in an interpretation involving a separation of employers' liability funds which depends on the locality where the risks insured against are run.

In my judgment the applicant is entitled to rank against the employers' liability fund of the company, including the deposit in Court, pari passu with the other holders of policies insuring against employers' liability risks.

LAWRENCE L.J. I agree with Eve J. that the words " carries on " in s. 33, sub-s. 1 (*i*), of the Assurance Companies Act, 1909, are for all practical purposes equivalent to the word " transacts " ; but I respectfully differ from the conclusion reached by the learned judge that the business in respect of which the claim in this case has arisen was business carried on or transacted outside the United Kingdom.

The dominant object of the Act, in my opinion, is the protection of all persons who effect, in the United Kingdom, insurances falling within one or other of the classes specified in s. 1. For the purpose of carrying out that object the Act imposes stringent conditions upon all assurance companies (wherever established) which carry on or transact assurance business within the United Kingdom. The Act does not appear to me to be concerned with the place where the persons effecting the insurance may happen to reside nor with the place where the risk insured against may happen

to be incurred, but to be concerned only with the question whether the insurance is effected within the United Kingdom or outside the United Kingdom, and in the former case provides that the company or body of persons transacting the assurance business must comply with the provisions of the Act.

In the circumstances of the present case I have come to the clear conclusion that the business in respect of the policies in question was transacted in the United Kingdom as part of the employers' liability insurance business carried on by the company at its head office in London, and that therefore the provisions of the Act apply to such business.

The expression "employers' liability insurance business" is defined in s. 1 (*d*) as consisting of "the issue of, or the undertaking of liability under, policies insuring employers against liability to pay compensation or damage to workmen in their employment." It follows, in my opinion, that the place where the policies are issued, or the liability under the policies is undertaken, is the place where such business is carried on or transacted. Sect. 33, sub-s. 1 (*i*), does not, in my opinion, purport to deal with the place where the workmen's claim against the employer may arise, but is concerned solely with the place where the company transacts the insurance business, and takes out of the operation of the Act all such insurance business as the company may transact outside the United Kingdom. It is not suggested that the business in the present case was transacted by any agency or branch which the company had established in France or Belgium, and in fact the company had established no such agency or branch. I confess that I find it difficult to conceive how in practice the company could carry on or transact employers' liability insurance business in France or Belgium without having a place of business in and complying with the law of those countries, except (if it be legally possible) by adopting the unusual course of employing a travelling agent clothed with authority to issue or accept liability under policies on behalf of the company. Be that as it may, however, it is beyond dispute that the policies in

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question in this case (which are English contracts expressed in the English language and are executed in England) were issued and the liability thereunder was undertaken by the head office of the company in London. In these circumstances it seems to me plain that the business relating to these policies was transacted by the company in London, although the risk insured against was the liability of the employer to pay compensation or damages to workmen in his employment abroad.

I agree that the appeal should be allowed.

Appeal allowed.

Solicitors for appellants: *Simmons & Simmons.*

Solicitors for respondent: *Downing, Middleton & Lewis.*

R. M.

C. A. 1927 — *May* 5, 10, 11, 23.

In re RYDER AND STEADMAN'S CONTRACT.

[1926. R. 2644.]

Law of Property—Undivided Shares—Entirety vested in 1924 "*absolutely and beneficially*" *subject with other Lands to paramount Jointure—Contract to sell entirety subject to Jointure—Transitional Provisions—Construction* —"*Immediately before the commencement of this Act*"—"*Not being settled land*"—*In whom vested—Statutory Trusts—Law of Property Act,* 1925 (15 *Geo.* 5, *c.* 20), *ss.* 35, 39; *Sch.* I., *Part IV., para.* 1 (2.) (3.)—*Settled Land Act,* 1925 (15 *Geo.* 5, *c.* 18), *s.* 1, *sub-s.* 1 (*v.*); *sub-s.* 7; *s.* 2—*Law of Property* (*Amendment*) *Act,* 1926 (16 *&* 17 *Geo.* 5, *c.* 11), *ss.* 1, 7, 8; *Schedule.*

Three vendors to whom land had been conveyed in 1924 in fee simple as tenants in common subject to but with an indemnity against a jointure rentcharge, charged thereon and on other lands in 1869, contracted in 1926 to sell the same land subject to the rentcharge but with the benefit of the indemnity, and proposed to convey the same as being the persons in whom the land "not being settled land" had vested as joint tenants upon the statutory trusts by virtue of the transitional provisions of para. 1 (2.) of Part IV., Sch. I., of the Law of Property Act, 1925.

The purchaser took the objection that by reason of the rentcharge the land became settled land on January 1, 1926, within s. 1, sub-s. 1 (v.), of the Settled Land Act, 1925, and that para. 1 (3.), and not para. 1 (2.), of Part IV., Sch. I., of the Law of Property Act, 1925, applied, and that the land was vested, not in the vendors, but in the other persons or person specified in para. 1 (3.):—

Held, (1.) That in Sch. I., Part IV., of the Law of Property Act, 1925, para. 1 (2.) and para. 1 (3.) constituted alternative provisions, the former

applying to land which was not, and the latter to land which was, settled land under the law existing previously to the commencement of the Act.

(2.) That inasmuch as the rights of the jointress were undisturbed by the sale, she was not a person interested in the land within the meaning of s. 35 of the Law of Property Act, 1925, whose incumbrance would attach to the net proceeds of sale, and the vendors, therefore, were not bound to exercise the statutory powers of a tenant for life vested in them by s. 28 of the same Act so as to convey free from the rentcharge, even if they could do so as trustees of a compound settlement (which was doubtful), and that even if the land were held from and after January 1, 1926, under a compound settlement, they could, in the circumstances of this case, convey subject to the rentcharge by virtue of s. 1 of the Law of Property (Amendment) Act, 1926.

(3.) That the land in question, "not being settled land," vested by virtue of para. 1 (2.) of Part IV. of Sch. I. of the Law of Property Act, 1925, in the vendors as joint tenants upon the statutory trusts, and that they had shown a good title according to the contract.

Decision of Astbury J. [1927] 1 Ch. 509 reversed.

Quaere, whether the documents creating the rentcharge could be coupled with the statutory trust for sale under the Law of Property Act, 1925, Sch. I., Part IV., para. 1 (2.), so as to form a compound settlement within s. 1 of the Settled Land Act, 1925, especially in view of sub-s. 7, added to that section by the Law of Property (Amendment) Act, 1926.

APPEAL from a decision of Astbury J. (1)

In April, 1924, under and by virtue of a resettlement of July 14, 1866, a marriage settlement of November 6, 1869 (appointing a jointure of 2500*l.* per annum to the wife for life and a term of 1000 years to secure it), a marriage settlement of July 19, 1897, and a disentail of March 10, 1920, certain freehold estates, including Blackacre, stood limited (subject to the 2500*l.* jointure and term) to such uses as the Duke of Marlborough and the Marquess of Blandford should jointly appoint.

By a conveyance on sale dated April 14, 1924, the Duke of Marlborough and the Marquess of Blandford appointed Blackacre to the three vendors in fee simple as tenants in common in equal shares subject to the jointure but with an indemnity against it.

By a contract dated February 13, 1926, the three vendors agreed to sell Blackacre to Mrs. Steadman for 1700*l.* subject to the jointure but with the benefit of the indemnity, so

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that the price was not affected by the jointure. The title was to commence with the settlement of July 19, 1897.

The investigation of title proceeded at first smoothly, but on October 26, 1926, the purchaser delivered a requisition to the following effect:—

"The property sold was by the conveyance of April 14, 1924, conveyed to the vendors as tenants in common subject to but indemnified against the 2500*l.* jointure rentcharge secured by the marriage settlement of November 6, 1869. The property therefore became settled land within the Settled Land Act, 1925 (see s. 1, sub-s. 1 (v.)), and was therefore settled land within the Law of Property Act, 1925 (see s. 205, sub-s. 1 (xxvi.)).

It is submitted therefore (*a*) that by virtue of the transitional provisions of the Law of Property Act, 1925, Sch. I., Part IV., para. 1 (3.) (as amended by the 1926 Act Schedule), the entirety of the property sold being settled land and being held under one and the same settlement vested in the trustees (if any) of the settlement as joint tenants upon the statutory trusts; or if there were no such trustees at the commencement of the Law of Property Act, 1925, then in the Public Trustee upon the same trusts (see para. 1 (3.), proviso i.); (*b*) that the proper persons to convey are the settlement trustees (if any) or if none the Public Trustee if requested and willing to act, or trustees to be appointed in his place by the vendors; such trustees respectively conveying in execution of the statutory trusts; (*c*) that the purchaser will not obtain a good receipt for her purchase money unless it is paid to or by the direction of the proper conveying parties as last aforesaid.

The purchaser therefore requires to be satisfied (*a*) as to what instruments constitute the settlement to which the property became subject at the commencement of the Law of Property Act, 1925. The settlement would appear to be a compound settlement consisting of: (1.) the resettlement of July 14, 1866; (2.) the marriage settlement of November 6, 1869; (3.) the marriage settlement of July 19, 1897, with the subsequent disentail of March 10, 1920; and

(4.) the conveyance of April 14, 1924, to the three vendors as tenants in common.

The purchaser requires to be satisfied (*b*) either (1.) as to who were the trustees of this settlement at the commencement of the Law of Property Act, 1925, or (2.) of the fact that there were none, and (*c*) if none either (1.) of the Public Trustee's acceptance of the trust or (2.) of a valid appointment by the vendors of trustees in his place."

The vendors contended that on January 1, 1926, Blackacre vested in them as joint tenants upon the statutory trusts, under Sch. I., Part IV., para. 1 (2.), and that they were now the estate owners with power to convey subject to the jointure and to give a proper receipt for the purchase money, and they issued a vendor and purchaser summons for a declaration that the requisition had been sufficiently answered and a good title shown.

Astbury J. decided (1), that Blackacre had vested on the statutory trusts in the compound settlement trustees (existing or to be appointed) under the Law of Property Act, 1925, Sch. I., Part IV., para. 1 (3.), and not in the three vendors under para. 1 (2.), and, also, that a sale under the statutory trusts must necessarily overreach the jointure, and could not be made subject thereto.

The vendors appealed. The appeal was heard on May 5, 10 and 11, 1927.

Farwell K.C. and *Walter Banks* for the appellants. The vendors have contracted to sell and convey this land subject to the jointure rentcharge, but the purchaser contends that they are bound to convey free from it. The rentcharge is for life and is not secured by a legal mortgage, and is therefore an equitable charge : Law of Property Act, 1925, s. 1, sub-ss. 1, 2 (*b*), 3. By sub-s. 6 of the same section a legal estate in an undivided share in land can no longer exist or be created. When land is conveyed to persons in undivided shares after the commencement of the Act, the grantees hold the same upon the statutory trusts, which include in limine a trust to

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sell: s. 34, sub-ss. 1 and 2; s. 35. The case of land which "immediately before the commencement of" the Act is held at law or in equity in undivided shares vested in possession is dealt with by para. 1 (1.), (2.), (3.), and (4.) of the transitional provisions in Sch. I., Part IV. (1); and we contend that the present case falls under para. 1 (2.) which, where "the entirety of the land (not being settled land) is vested absolutely and beneficially in not more than four persons entitled thereto in undivided shares," subject or not to incumbrances affecting the entirety, vests the land in them as joint tenants upon the statutory trusts.

The words "not being settled land" refer to land which is not settled land immediately before the commencement of the Act. The criterion is what was the position immediately before the Act came into operation. This certainly was not, we submit, settled land then, although the entirety was subject to this rentcharge.

If s. 1, sub-s. 1 (v.), of the Settled Land Act, 1925, stood alone it is clear that this land subject to the rentcharge would be settled land within that section, but the Law of Property (Amendment) Act, 1926, added sub-s. 7 to s. 1 of the Settled Land Act, 1925, to the effect that "This section

(1) Law of Property Act, 1925, Sch. I., Part IV., para. 1, as amended by the Law of Property (Amendment) Act, 1926:—

1. "Where, immediately before the commencement of this Act, land is held at law or in equity in undivided shares vested in possession, the following provisions shall have effect:—

(1.) . . . .

(2.) If the entirety of the land (not being settled land) is vested absolutely and beneficially in not more than four persons of full age entitled thereto in undivided shares free from incumbrances affecting undivided shares, but subject or not to incumbrances affecting the entirety, it shall, by virtue of this Act, vest in them as joint tenants upon the statutory trusts.

(3.) If the entirety of the land is settled land (whether subject or not to incumbrances affecting the entirety or an undivided share) held under one and the same settlement, it shall, by virtue of this Act, vest, free from incumbrances affecting undivided shares, and from incumbrances affecting the entirety, which under this Act or otherwise are not secured by a legal mortgage, and free from any interests, powers, and charges subsisting under the settlement, which have priority to the interests of the persons entitled to the undivided shares, in the trustees (if any) of the settlement as joint tenants upon the statutory trusts."

does not apply to land held upon trust for sale," and by s. 8 of the Amendment Act, that addition is to be construed as one with the Settled Land Act, 1925, and to be deemed to have come into operation on January 1, 1926. The words "not being settled land" in the transitional provisions of Sch. I, Part IV., para. 1 (2.), refer to what was settled land under the old law immediately before the commencement of the Law of Property Act, 1925, and not to what was created settled land by the Settled Land Act, 1925. Under the old law the vendors were owners in fee simple as tenants in common in equal shares subject to a rentcharge. If the decision of Astbury J. is right, the purchase money will have to be paid to the trustees of the compound settlement of the vendors' predecessors in title, and be held by those trustees until the jointress dies.

Under the statutory trusts by virtue of Sch. I., Part IV., para. 1 (2.), they cannot sell except subject to the rentcharge, and although in the hands of their purchaser the land may be settled land within s. 20, sub-s. 1 (ix.), of the Settled Land Act, 1925, that purchaser can, by virtue of s. 1, sub-ss. 1 and 2, of the Amendment Act sell the fee simple subject to the rentcharge.

Then it is said that if this land is vested in the vendors, subject to the rentcharge, upon trust to sell, they have power under the joint effect of the Law of Property and Settled Land Acts to sell free from the rentcharge, and that being so, they must sell free from it. But although by s. 28 of the Law of Property Act, 1925, trustees for sale have the powers of a tenant for life and can overreach equitable charges, that is not applicable to their trust to sell under the statutory trusts, under which they have no power to overreach prior equitable interests or charges, and a conveyance by them does not have the same effect as a conveyance by a tenant for life under s. 72 of the Settled Land Act, 1925.

But even if the words "not being settled land" refer to land coming within the definition or provisions in the Settled Land Act, 1925, relating to settled land, then we submit that the appellants come within para. 1 (2.) and not within

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para. 1 (3.), because whether the words "not being settled land" refer to settled land before or after the Act, this land never became settled land, because the tenancy in common was at once, by virtue of the Act, converted into a joint tenancy upon the statutory trusts.

Hubert Rose for the respondent. I submit that the view taken by the vendors cannot be supported either on the true construction of Sch. I., Part IV., of the Law of Property Act, 1925—a construction which has been corroborated by the Amendment Act—or on the general scheme of the new legislation. If that view be correct it will cause much inconvenience and throw great doubt upon titles of a similar nature.

Although regard must be had to the moment of time before the commencement of the Act in ascertaining whether the transitional provisions in Sch. I., Part IV., are applicable, yet for the purpose of ascertaining upon which of the four alternative paths therein indicated the entirety of the land travels, regard must be had to the definition of settled land in s. 205 of the Act, which says: "In this Act unless the context otherwise requires" the expression "settled land" shall have the same meaning as in the Settled Land Act, 1925. That the context does not "otherwise require" appears from the provisions of Sch. I., Part IV.; for instance, in para. 1 (1.) (*a*) there is a reference to incumbrances "which under this Act or otherwise, are not secured by legal terms of years absolute," and that contemplates that the other transitional provisions of the Act have already operated. Then in para. 1 (2.) settled land is mentioned in order to be excluded. There was no need to exclude it unless, without exclusion, it would have been included.

If "not being settled land" referred merely to land which under the Settled Land Act, 1882, was settled land, it would be senseless, because land "vested absolutely and beneficially" in several persons in possession never was settled land under the former law, and could only be settled land by virtue of the Settled Land Act, 1925. I rely strongly on that. Land is none the less settled land for the purposes of Part IV.

because it becomes by the provisions thereof subject to a trust for sale.

[SARGANT L.J. If land be vested absolutely and beneficially in not more than four persons, how can it be settled land under the new law any more than under the old law ?]

If it is subject to incumbrances it could be. In certain circumstances it might be settled land under the new law. In both the Law of Property and Settled Land Acts the term "settled land" is often used to describe what has ceased to be settled land, whether or not it has become subject to a trust for sale. By the transitional provisions of the Settled Land Act, 1925, s. 37, and Sch. II., para. 1 (5.), that paragraph is not to apply where, at the commencement of the Act, settled land is held at law or in equity in undivided shares vested in possession. There, the term "settled land" is used of land where it is ceasing to be settled land, and the term as used refers to "the commencement of the Act" and means settled land as defined by the Act. A "settlement subsisting at the commencement of this Act" includes a settlement created by virtue of the Act immediately on the commencement thereof: s. 117, sub-s. 1 (xxiv.). In Sch. I., Part IV., para. 1 (3.), of the Law of Property Act, 1925, settled land "held under one and the same settlement" includes by virtue of s. 205, sub-s. 1 (xxvi.), which refers to the definitions in s. 117, sub-s. 1 (xxiv.), of the Settled Land Act, 1925, land comprised in an instrument which, under that Act, constitutes a settlement, or is deemed to be a settlement subsisting for the purposes of that Act.

The vendors cannot sell subject to the jointure, but must under the scheme of the Act sell free from it. A conveyance subject to the jointure will have to be by a vesting deed and trust instrument. If that is not the true view, then they must overreach the jointure, because they hold under an immediate binding trust for sale.

The construction for which I contend is supported by the notes to para. 1 (3.), which I read as part of my argument, in Wolstenholme & Cherry's Conveyancing Statutes, 11th ed., vol. i., p. 503: "As to what is 'settled land': S. L. A.,

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1925, ss. 1, 2, 3; for the purposes of this para. it includes land held by an absolute owner subject to family charges, but not land affected by an equitable interest created for money's worth, which can only be converted into settled land after 1925 by a settlement *ad hoc* under s. 21."

The construction is also corroborated by the Amendment Act of 1926. This rentcharge was secured by a legal term of 1000 years, which is a term of years absolute within s. 1, sub-s. 1 (*b*), of the Law of Property Act, 1925. The rentcharge has been converted into an equitable interest by that Act, but nothing hitherto has destroyed the legal term of years. The vendors really acquired under their conveyance of 1924 a fee simple in reversion expectant upon the term; and the amending Act made it clear that although the term of years was outstanding, the land should nevertheless be sold free from it. The reason for the amendment was that the legislature contemplated that it was dealing with settled land under the Settled Land Act, 1925. That supports my contention that para. 1 (3.) of Part IV. applies to this case, and it has been amended in a way which would not have been necessary if it had not applied.

[LORD HANWORTH M.R. referred to *Attorney-General* v. *Clarkson* (1) upon the doctrine of parliamentary interpretation.]

There was no intervening decision in this case, and I cannot say that there has been any parliamentary adoption. The Acts are to be read as one with the Amendment Act, which brings Sch. I., Part IV., para. 1 (3.), of the Law of Property Act, 1925, into accord with s. 36 of the Settled Land Act, 1925.

If the appellants' construction is right, the jointress will fall within the words "whose incumbrance is not secured by a legal mortgage" in s. 35 of the Law of Property Act, 1925, defining "statutory trusts," and the trustees can only give effect to her claim by retaining the proceeds of sale; she will have no charge on the land as soon as it is sold by the trustees under the statutory trust. The trustees can sell subject to legal incumbrances but they must overreach mere

(1) [1900] 1 Q. B. 156.

equities. Sect. 2, sub-s. 2, of the Law of Property Act, 1925, as amended, does not apply to this case, because the trustees are neither approved or appointed by the Court, nor a trust corporation. But under s. 28 of that Act trustees for sale have all the powers of a tenant for life under s. 38 of the Settled Land Act, 1925, and, when proper trustees are appointed, can sell free from the jointure, and the effect of a conveyance by a tenant for life is set out in s. 72, but the purchase money must be paid to the trustees of the compound settlement.

Personal representatives are by s. 39 of the Administration of Estates Act, 1925, given the same powers as trustees holding land upon an effectual trust for sale, "including power to overreach equitable interests," which involves that trustees for sale can also do so. By the Amendment Act of 1926, words are added to s. 35 of the Law of Property Act, 1925, which treat the persons who hold on the statutory trusts as trustees for sale, and "trustees for sale" by s. 205, sub-s. 1 (xxix.), of the Law of Property Act, 1925, are defined as "the persons (including a personal representative) holding land on trust for sale," and inferentially trustees for sale, equally with personal representatives, can overreach equitable interests.

Farwell K.C. in reply. The appellants have no power to sell free from the jointure, they can only sell subject to it. No case of hardship arises, and the position will be the same as before the Acts. The purchaser will get the land subject to the jointure and the jointress will suffer no harm; she will still have her charge on the land. The consideration of hardship is a dangerous guide to the construction of statutes. If the appellants are wrong, there will be a hardship on them, because they will never during the rest of the life of the jointress be able to receive any part of the purchase money. If they have power to sell subject to the jointure, s. 2 of the Law of Property Act, 1925, does not make it obligatory on them to sell free from it.

The transitional provisions of Part IV. do not operate to vest in the appellants any greater estate than before the

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Act; they only alter the nature, not the extent, of the estate, by converting it from a tenancy in common into a joint tenancy upon the statutory trusts, but still subject to the jointure. Sect. 35 does not enlarge their estate, it only defines what the statutory trusts are and the interest of the persons in the land sold. Para. 1 (2.) of Part IV. presupposes the state of affairs in this case. Sect. 35 cannot mean to include persons who have an interest paramount to the trust for sale; it only protects incumbrancers on what is sold, namely the land subject to the jointure.

It is said that trustees for sale have the powers of a tenant for life, and that under the power to sell conferred by the Settled Land Act, 1925, and by s.72 of that Act they can convey free from this jointure. But s. 72 only says that a conveyance by a tenant for life shall operate in a particular way, and does not give the tenant for life power to overreach where the only settled land vested in him is itself subject to a paramount charge. There is no provision that a conveyance by trustees for sale shall have the effect of a conveyance by a tenant for life under s. 72.

In his decisions in *In re Leigh's Settled Estates* (1) Tomlin J. was not considering the case of statutory trusts; and, further, in this case "the context otherwise requires." Those decisions have no application here. A statutory trust is a trust to sell: s. 35 of the Law of Property Act, 1925. Tomlin J. was dealing with an "immediate binding trust for sale" in connection with s. 1, sub-s. 7, and s. 3 of the Settled Land Act, 1925. In *In re Earl of Carnarvon's Settled Estates* (2) Romer J. held that land held like this before the Acts was not settled land.

Cur. adv. vult.

May 23. LORD HANWORTH M.R. This is an appeal from a judgment of Astbury J. (3) given on February 17, 1927, upon a vendor and purchaser summons, taken out by the vendors, for a declaration that a requisition made on behalf of the

(1) [1926] Ch. 852; (No. 2) [1927] W. N. 122; ante, p. 13.

(2) [1927] 1 Ch. 138.

(3) [1927] 1 Ch. 509.

purchaser had been sufficiently answered, and a good title shown.

By a conveyance on sale dated April 14, 1924, the Duke of Marlborough and his eldest son, under their powers, appointed Blackacre to the three vendors in fee simple as tenants in common in equal shares, subject to but with an indemnity against the jointure charged upon certain freehold estates including Blackacre. By a contract dated February 13, 1926, the three vendors agreed to sell Blackacre to the purchaser, subject to the jointure, but with the benefit of the indemnity; so that the price was not affected by the jointure.

The vendors contended that on January 1, 1926, the date when the Settled Land Act, 1925, and the Trustee Act, 1925, and the Law of Property Act, 1925 (15 Geo. 5, cc. 18, 19 and 20) came into operation, Blackacre vested in them as joint tenants upon the statutory trusts for sale under Sch. I., Part IV., para. 1 (2.), of the Law of Property Act, 1925, and that they were now the estate owners with power to convey, subject to the jointure, and to give a proper receipt for the purchase money. The arguments for and against this contention are set out in the judgment of Astbury J. (1), in which report the facts are also fully stated. Astbury J. decided against the vendors' contention, and they appeal. The question for this Court is what is the true construction to be placed upon certain clauses in Sch. I., Part IV., of the new Law of Property Act. This is the first case in which the construction of that Act, and of its concomitant Acts, has come before this Court. The three Acts are interconnected not only by the subject-matters to which they relate, but also by the definition clauses contained in them.

It is obvious that the terms of these three Acts, embodied in a total of four hundred sections, and fourteen schedules, not to mention other relevant Acts which came into operation on the same day, must give rise to a number of problems in conveyancing, and in the law under which property is held and to be dealt with. The Law of Property (Amendment) Act, 1926, which makes amendments in those three

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Acts, adds its testimony to this statement. These problems must now be determined by the rules of law applicable to the interpretation of statutes. They cannot be solved by reliance upon the opinions of writers of text-books, however able, who are yet living, or of those who have been closely and devotedly identified with the passage of this legislation through Parliament. Such persons may be expected to know what was the original intention of the Bill introduced into Parliament, and what was the purpose and design of later amendments; but words in the statute must be considered and construed as they stand, even if that construction may involve subsequent difficulties, or even hardship in cases that are conceived as possible to arise. "A sense of the possible injustice of legislation ought not to induce your Lordships to do violence to well settled rules of construction, though it may properly lead to the selection of one rather than the other of two possible interpretations of the enactment": see per Lord Herschell in *Arrow Shipping Co.* v. *Tyne Improvement Commissioners.* (1) It may, however, be observed that Astbury J. says of the construction of the Act adopted by him: "There is no doubt that in this particular case the Acts have worked a very serious hardship on the vendors."

Turning now to the Law of Property Act, 1925, by s. 39 the provisions set out in the First Schedule to the Act are to have effect "for the purpose of effecting the transition from the law existing prior to the commencement of the Law of Property Act, 1922, to the law enacted by that Act (as amended)." These provisions, therefore, are to mould what had been done under the law as it existed before 1922, into conformity with the new system. By s. 39, sub-s. 4, the appropriate provisions in the Schedule are to apply "for subjecting land held in undivided shares to trusts for sale." This same heading is placed before the group of provisions in Part IV. of Sch. I. The question is which of these provisions applies to the present case? Before the commencement of the Law of Property Act, 1925, the land of the vendors was not settled land; but it was "immediately before the

(1) [1894] A. C. 508, 516.

commencement of this Act held at law or in equity in undivided shares vested in possession." Does para. 1 (2.) or para. 1 (3.) of the subsequent paragraphs in Part IV. apply ?

In order to answer this question it seems right to bear in mind the purpose for which these transitional clauses are introduced as already stated, and to repeat the opening words of Part IV. of the Schedule immediately before each sub-paragraph—whether (2.) or (3.). The result of this is that the land which is to be operated upon by the sub-paragraph is land which is regarded as it was immediately before the commencement of the Act, and that same land is the land affected by the operation of the later words. Can the time at which this same land is to be regarded be changed in the same sentence without clear words to that effect ? I think not. " Before the commencement of this Act " is the dominant time at which the land is considered and affected by these transitional sub-paragraphs. In this view the words " not being settled land " must also be attributed to the time immediately before the commencement of the Act. It may be that those words are unnecessary or tautologous ; but it seems difficult to put a construction upon them which brings into the ambit of the sub-paragraph land considered as it was before the commencement of the Act and a few words later, considered as it is under the operation of the new Act, without any indication that the land is to be regarded at two different moments of time with inconsistent results. This is a part of the Act which is intended to deal with transition, and to formulate how land held as it was immediately before the commencement of the Act can be brought under the new system. It is such land upon which the transition is to work. A sufficient meaning can in my judgment be given to the words " not being settled land," if they are taken as indicating a caution, or nota bene, that sub-para. (2.) in question does not deal with settled land. As to that, the next sub-paragraph is the operative one. This construction is in accord with the ordinary canons of construction and leads to no hardship upon the vendors.

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Two objections are raised to this construction. The first, that under the Interpretation clause—s. 205, sub-s. 1 (xxvi.), of the Law of Property Act—"settled land" is to have the meaning given to it by s. 2 and s. 1, sub-s. 1 (v.), of the Settled Land Act, 1925, so that land subject to such a jointure as Blackacre is, is to be deemed "settled land." This definition applies, however, only unless the context otherwise requires, and the difficulty already pointed out of interpreting Sch. I., Part IV., para. 1 (2.), in the manner suggested appears to me to indicate that the context does "otherwise require." The second objection is that s. 35 of the Law of Property Act militates against the interpretation of the clause that I have adopted. That section expresses the meaning of the statutory trusts. The trustees are to sell and stand possessed of the net proceeds of sale after deductions named have been made "upon such trusts, and subject to such powers and provisions, as may be requisite for giving effect to the rights of the persons interested in the land." Those persons are defined to include an incumbrancer "whose incumbrance is not secured by a legal mortgage." It is said that the jointress in the present case is such a person, for her incumbrance is not secured by a legal mortgage. She, therefore, fulfils one limb of the definition. It is, however, a definition, and only a definition, which may enable an incumbrancer's rights to be considered; but, per se, it does not confer new rights, and the trustees for sale are to hold the net proceeds only subject to such powers as may be requisite for giving effect to rights. If the rights of the jointress are not imperilled, it is not requisite to give effect to her rights by withholding the purchase money from the vendors.

The three vendors held the land subject to the rentcharge. The extent of their estate is not enlarged. They convey it subject to the rentcharge which is protected by para. 1 (8.) of this same Part IV. of the Schedule, and no such power as of withholding the purchase money is requisite to give effect to the rights of the jointress after sale. Astbury J.'s judgment turned upon his feeling unable to accept the interpretation as to the meaning of "not being settled land" in Sch. I.,

Part IV., para. 1 (2.), which I have adopted, and he gives reasons for his view derived from some difficulties or problems that may arise, if the interpretation contended for by the vendors is accepted. I am conscious that I have not referred to or dealt with all of them; but such difficulties and problems must be considered when they arise in a concrete form. It may be that even yet another amending Act may be required to get rid of difficulties arising as the sequel to the interpretation given to the more fundamental clauses of the Acts. I will only add that I have had an opportunity of considering Sargant L.J.'s judgment, and I agree with the view that he has expressed upon the other points raised and dealt with by him. The appeal is allowed, and the order will be as stated by Sargant L.J.

SARGANT L.J. The present appeal involves the determination of important questions under the Law of Property Act, 1925, and relates particularly to the effect of the transitional provisions of s. 39 of the Act as affecting land held in undivided shares.

The three appellants are the vendors, and the respondent is the purchaser under a contract dated February 13, 1926, for the sale of certain freehold land which has throughout been referred to as Blackacre. The origin and nature of the estate and interest of the appellants in this land are sufficiently indicated in the following paragraph, which is substantially taken from the report of this case in the Court below. (1)

In April, 1924, under and by virtue of a resettlement of July 14, 1866, a marriage settlement of November 6, 1869 (appointing a jointure of 2500*l.* per annum to the wife for life and a term of 1000 years to secure it), a marriage settlement of July 19, 1897, and a disentail of March 10, 1920, certain freehold estates, including Blackacre, stood limited (subject to the 2500*l.* jointure and term) to such uses as the Duke of Marlborough and the Marquess of Blandford should jointly appoint. By a conveyance on sale dated April 14,

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1924, the Duke of Marlborough and the Marquess of Blandford appointed Blackacre to the three vendors in fee simple as tenants in common in equal shares subject to, but with an indemnity against, the jointure.

In this state of things the vendors by the contract above referred to agreed to sell Blackacre to the purchaser for 1700*l.* subject to the jointure but with the benefit of the indemnity against it. Apart from the legislation which had come into operation on January 1, 1926, there would have been no difficulty in carrying out this contract, conveying the land to the purchaser, and giving a good receipt for the purchase money. But some difficulties have been introduced by this legislation, and particularly by that part of it which relates to undivided shares in land.

Sect. 34 of the Law of Property Act, 1925, prohibits in general the creation of an undivided share in land, and provides that where after the commencement of that Act land is expressed to be conveyed to any persons in undivided shares and those persons (as was the case here) are of full age and not more than four in number, the conveyance shall operate as if the land had been expressed to be conveyed to the grantees as joint tenants upon the statutory trusts thereinafter mentioned, being trusts for the sale by the grantees of the land held by them under the conveyance. Sect. 39 of the same Act, which is headed by the phrase "Transitional Provisions," enacts, so far as material, as follows: "For the purpose of effecting the transition from the law existing prior to the commencement of the Law of Property Act, 1922, to the law enacted by that Act (as amended)"—such last mentioned law being identical, for the present purpose at least, with the law enacted by the Law of Property Act, 1925—"the provisions set out in the First Schedule to this Act shall have effect . . . . (4.) for subjecting land held in undivided shares to trusts for sale. . . . ."

Part IV. of the First Schedule to the Act is headed by the words "Provisions subjecting land held in undivided shares to a trust for sale," and provides, amongst other things,

as follows: "1. Where immediately before the commencement of this Act land is held at law or in equity in undivided shares vested in possession, the following provisions shall have effect:—(2.) If the entirety of the land (not being settled land) is vested absolutely and beneficially in not more than four persons of full age entitled thereto in undivided shares free from incumbrances affecting undivided shares, but subject or not to incumbrances affecting the entirety, it shall, by virtue of this Act, vest in them as joint tenants upon the statutory trusts." On the other hand, in the event of the entirety of the land being settled land provision is made by sub-para. (3.) of para. 1 for its vesting in the trustees (if any) of the settlement, or until there should be such trustees in the Public Trustee, and in either event upon the statutory trusts, and further, in any case to which the previous provisions of Part IV. do not apply it is provided by sub-para. (4.) of para. 1 that the land shall vest in the Public Trustee upon the statutory trusts.

In this state of things the first question to be determined is, who are the persons in whom Blackacre became vested under these transitional provisions? Did it vest under sub-para. (2.) in the three vendors as joint tenants upon the statutory trusts? Or did it vest under sub-para. (3.) or sub-para. (4.)? At first sight the answer would seem to be quite simple and straightforward. The entirety of Blackacre was, immediately before the commencement of the Act, vested absolutely and beneficially in the three vendors; it was not then settled land, and it was subject only to an incumbrance, namely the jointure, affecting the entirety. And apparently, therefore, it complied with all the requisites of sub-para. (2.), and would have been converted by the statute from being vested in the vendors as tenants in common to being vested in them as joint tenants upon the statutory trusts.

This prima facie view was, however, controverted by the purchaser's advisers. They asserted that in the construction of Part IV. of the First Schedule the phrase "settled land" must, by virtue of s. 205 of the Law of Property Act, 1925, have the same meaning as in the Settled Land Act, 1925;

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they pointed out that under ss. 2 and 1, sub-s. 1 (v.), of the Settled Land Act, 1925, land subject to such a jointure as Blackacre was settled land; and they drew the conclusion, which has been accepted by the learned judge, that the entirety of the land vested under the provisions of sub-para. (3.) of para. 1 of Part IV. of the First Schedule in the trustees of the settlement or intermediately in the Public Trustee.

In my judgment, however, this construction gives too rigid an effect to the definition of "settled land" in sub-s. 1 of s. 205 of the Law of Property Act, 1925. Under that sub-section the expression "settled land" and the other expressions in the sub-section are given the meanings thereby assigned to them only "unless the context otherwise requires." Now the transitional provisions in Part IV. are for the very purpose of changing the legal position existing previously to the Act into a new legal position, to take effect under and subsequent to the Act. And, when in the course of so doing the Act defines the position existing previously to the Act, the definition must naturally, and indeed almost inevitably, refer to the law as it stood before the Act, and can hardly, without some confusion of thought, be importing into that definition a state of law which is only to exist after the Act. In sub-para. (2.) itself the land dealt with is defined as land the entirety of which "(not being settled land) is vested in undivided shares." The last part of this definition obviously refers to the status of the land previously to the Act, and cannot refer to a status incapable of existing after the Act. It is therefore inconsistent with the context to apply to that part of the definition which consists of the words "not being settled land" a meaning derived from the new law introduced by the Act itself. The result would be a mongrel definition, involving a mixture of the old law and the new law, which is wholly unsatisfactory.

Perhaps there should be noticed here, if only for the purpose of rejection, a somewhat subtle argument for the purchaser, of the following nature. It is said that the words "(not being settled land)" in sub-para. (2.) imply that the sub-paragraph includes not only land which is not settled

land but some land which is settled land; that if the phrase "settled land" here has reference to the law existing before the Act, there could not be any settled land falling within the definition in sub-para. (2.), while if it has reference to the law as changed by the Act it might be satisfied by such a state of things as existed here with reference to Blackacre; and that therefore the language of the sub-paragraph is better satisfied by reading the expression "settled land" as referring to the new law. But this argument neglects the consideration that the paragraph deals with both of two alternatives—namely, that of the land being free from incumbrances and that of the land being subject to incumbrances. Even under the new law the land, if free from incumbrances, would be no more settled land than under the old law; and, therefore, in the case of the first alternative the implication said to be involved in the use of the phrase "(not being settled land)" would be no better satisfied by reading the phrase "settled land" as referring to the new law rather than to the old.

But in truth the subtleties considered in the last preceding paragraph are based upon a suggestion of implication which is too slight to prevail against the more obvious inferences to be drawn from the fact that sub-para. (2.) is, as already pointed out, an enactment converting an existing legal position under the old law into a new legal position under the new law; and, if sub-para. (2.) is closely compared with sub-para. (3.), it seems reasonably clear that they constitute alternative provisions, and that while sub-para. (3.) deals exclusively with the case of the entirety of the land being settled land, sub-para. (2.) deals exclusively with the entirety of the land being unsettled land. In other words, the words in brackets "(not being settled land)" in sub-para. (2.) are merely descriptive of the land being dealt with by that sub-paragraph, and the commencing words of the sub-paragraph are precisely correlative and alternative to the commencing words of sub-para. (3.), and mean: "If the entirety of the land is not settled land and is vested," etc. This construction merely imputes some slight clumsiness of

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expression to the drafting of sub-para. (2.) and in all other respects seems far more satisfactory than the construction suggested for the purchaser.

So far then the result is that on January 1, 1926, Blackacre became vested, subject to the jointure and to the term of years for securing it but with the benefit of the indemnity against it, in the vendors as joint tenants in fee simple upon the statutory trusts for sale; and the natural conclusion would seem to be that they could sell what they had got—namely, the fee simple of Blackacre subject to and indemnified against this existing incumbrance, and so carry out their contract. But here again the purchaser raises a difficulty which, as stated by her counsel, may be summarized as follows. It is contended that under s. 35 of the Law of Property Act, 1925, the jointress here is a person whose incumbrance is not secured by a legal mortgage and would attach to the net proceeds of sale in the hands of the vendors as trustees for sale; that under s. 28 of the same Act trustees for sale are to have the powers of sale of a tenant for life under the Settled Land Act, 1925, and that these powers when exercised are to operate to overreach any equitable interests made to attach to the net proceeds of sale; that tenants for life of the compound settlement said to exist in Blackacre could overreach the equitable interests of the jointress under s. 38 and s. 72 of the Settled Land Act, 1925, if they caused trustees to be appointed of the compound settlement and allowed the purchase-money to be paid to them; and accordingly that the vendors cannot sell and convey to the purchaser subject to the jointure, but are bound to sell and convey freed from the jointure and to allow the purchase-money to be paid to the trustees of the compound settlement when appointed.

This argument is an elaborate and ingenious one; but, in my judgment, when carefully examined it breaks down at every stage. In the first place, s. 35 of the Law of Property Act is obviously aimed at giving corresponding rights in the net proceeds of sale to incumbrancers whose rights in the land are disturbed by the sale; it does not

apply to a case such as this where the sale is made subject to the incumbrance. In such a case, it is not "requisite" to give "effect to the rights of the person interested in the land" by giving rights against the net purchase money. For the rights of the incumbrancer in the land are left entirely unaffected by the sale. Next, s. 28, sub-s. 1, of the Law of Property Act, 1925, does not apply; for, inasmuch as the equitable interest of the jointress will not attach to the net proceeds of sale, the exercise of the powers conferred by that sub-section will not operate to overreach the equitable interest of the jointress. Again, it is at the least extremely doubtful whether the documents creating the jointure can be coupled with the statutory trust for sale under Part IV. of the First Schedule to the Law of Property Act, 1925, so as to form a compound settlement within s. 1 of the Settled Land Act, 1925, especially in view of the provision introduced into that section by "a minor amendment" in the Schedule to the Law of Property (Amendment) Act, 1926—namely, "(7.) This section does not apply to land held upon trust for sale." And lastly, even if Blackacre is held from and after January 1, 1926, under a compound settlement, yet s. 1 of the Law of Property (Amendment) Act, 1926, expressly allows the conveyance of settled land subject to a prior interest where the land had, previously to January 1, 1926, been conveyed to a purchaser subject to the prior interest whether with exoneration from, or indemnity against, the prior interest or not.

In my view no importance is to be attached in connection with this case to the inconvenience or inconsistency that may arise in the case of two married women entitled before January 1, 1926, to land in fee simple as tenants in common with in each case a restraint on anticipation. It may be that in a very unusual case of this kind difficulties may arise and the protection of one or other of the married women may be endangered. If so, this is the result in one exceptional case of the drastic legislation which converts tenancies in common into joint tenancies upon trust for sale. It cannot alter the general construction of the transitional provisions of the Act with regard to land held in undivided shares.

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In conclusion I desire to add that the learned judge attached undue weight to certain expressions in a text-book written by a well known conveyancer. Such expressions are no authority on the construction and effect of recent legislation; at the most they can only be adopted by counsel as embodying their argument or by the Court as representing its ultimate view. Nor is any importance to be attributed to the views of the writer, because he may be recognized as the draftsman of the statute in question. On the contrary, that very fact may disable him from taking an unbiased view of the expressions used in the Act.

In my judgment the order appealed from should be discharged, and it should be declared that the requisitions and objections of the purchaser have been sufficiently answered, and that the vendors have shown a good title to the property in accordance with the contract. The purchaser must pay the costs here and below.

LAWRENCE L.J. I have had the advantage of reading the judgments which have just been delivered by my Lords. I agree with them and have nothing to add.

Appeal allowed.

Solicitors for appellants: *Stow, Preston & Lyttelton, for Andrew Walsh & Bartram, Oxford.*

Solicitors for respondent: *Steadman, Van Praagh & Gaylor.*

R. M.

C. A.
1927
April 29.

In re PAGET.

Ex parte OFFICIAL RECEIVER.

[599 of 1926.]

Bankruptcy—Public Examination—Questions tending to criminate—Refusal of Debtor to answer—Bankruptcy Act, 1914 (4 & 5 *Geo.* 5, *c.* 59), *s.* 15, *sub-s.* 8; *s.* 73.

The object of the public examination of a debtor under s. 15 of the Bankruptcy Act, 1914, is not merely to obtain a full and complete disclosure of his assets and the facts relating to the bankruptcy in the interests of his creditors, but is also for the protection of the public. A debtor, therefore, is not entitled to refuse to answer questions put to him at his public examination on the ground that by so doing he may incriminate himself.

In the course of his public examination the debtor refused to answer a certain question on the ground that he might thereby incriminate himself. The registrar reported the matter to the judge. On the case coming on before him the judge interviewed the debtor in his private room and on his return into Court stated (1.) that he was not satisfied that an answer to the question would result in further assets or secure rights for the creditors, and (2.) that he was satisfied that there were serious personal reasons why it would be to the debtor's detriment to answer the question in public. On appeal:—

Held, that neither of the reasons given by the judge for declining to order the debtor to answer the question was a sufficient reason.

In re Atherton [1912] 2 K. B. 251 approved and followed.

Appeal from a decision of Clauson J.

In this case the public examination of the debtor under s. 15 of the Bankruptcy Act, 1914, was held on December 21, 1926, and adjourned to March 8, 1927. At the adjourned public examination the official receiver put to the debtor the following question: "In what name did you enlist in the First Battalion of the London Fusiliers in 1916?" The debtor refused to answer the question, notwithstanding the ruling of the registrar that it was one which he must answer, and the registrar thereupon reported his refusal to the judge pursuant to r. 86 of the Bankruptcy Rules, 1915. The report came on for consideration by Clauson J. on March 14, 1927, when the official receiver stated to the learned judge that the debtor had used other names besides that of

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Richard Paget, in which name he was adjudicated; that he was not satisfied that he had obtained the debtor's true name; and that it was essential to fully identify him; and he therefore asked the learned judge to direct the debtor to answer the question. The learned judge, after questioning the debtor in Court, and the debtor objecting to answer, interviewed the debtor in his private room, the official receiver remaining in Court. On his return to the Court the learned judge said that he was not satisfied that giving the name under which the debtor enlisted would result in further assets or secure rights for the creditors; that if he thought there was a reasonable chance of the creditors benefiting he would direct the debtor to answer, but he was not satisfied that it was so. He further stated that he was satisfied that there were serious personal reasons why it would be to the debtor's detriment to give in public his name. He accordingly refused the application.

The official receiver and the Board of Trade appealed. The appeal was heard on April 29, 1927.

Sir Thomas Inskip S.-G. and *Roland Burrows* for the appellants. Under s. 15, sub-s. 8, it is the duty of the debtor to answer all such questions as the Court may put or allow to be put to him, and it has been held in *In re Atherton* (1) that he must do so notwithstanding that the answers thereto may incriminate him. It is quite clear that the dealings of the debtor extended back beyond the date of his joining the army, and it is necessary for the official receiver to know in what name he was then trading in order to ascertain what are his debts. Clauson J. dealt with the case as if the only persons concerned were the debtor's creditors, but that is not so. The object of s. 15 is not only to protect the interests of the debtor's creditors but also those of the general public. The duties of the official receiver are defined by s. 73 of the Act. They are to investigate the conduct of the debtor and to report to the Court and to give assistance in relation to the prosecution of any fraudulent debtor as the Board

(1) [1912] 2 K. B. 251.

of Trade may direct. There is here a complete blank between the year 1916 when the debtor enlisted in the army and the year 1918 when he was demobilized, and unless the question proposed is answered by the debtor a whole series of transactions may be withdrawn from the knowledge of the official receiver in respect of which he will be unable to make any report to the Court. It is not disputed that the judge had a discretion either to commit or to refuse to commit the debtor to prison for refusal to answer. But what is objected to is the procedure adopted by the learned judge. If he had exercised his discretion on right grounds that might be a reason for not allowing the appeal, but here the judge has exercised his discretion on grounds which are wholly insufficient. He has in fact assumed the duties of the official receiver and has made a report to the Court.

[They were stopped.]

The debtor appeared in person and stated that he was willing to give the required information to the official receiver in private provided that public use was not made of it.

LORD HANWORTH M.R. This application must be granted. It arises upon a matter of public importance, but perhaps too great significance should not be attached to it. The debtor in the present case came up for public examination on December 21, 1926, under the provisions of s. 15 of the Bankruptcy Act, 1914, which require that a debtor against whom a receiving order has been made shall be publicly examined as to his affairs. I use that word comprehensively, the object of the examination being not merely for the purpose of collecting the debts on behalf of the creditors or of ascertaining simply what sum can be made available for the creditors who are entitled to it, but also for the purpose of the protection of the public in the cases in which the bankruptcy proceedings apply, and that there shall be a full and searching examination as to what has been the conduct of the debtor in order that a full report may be made to the Court by those who are charged to carry out the examination of the debtor. To concentrate attention upon the mere debt collecting and

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distribution of assets is to fail to appreciate one very important side of bankruptcy proceedings and law.

By s. 73 of the Bankruptcy Act, 1914, it is provided: "As regards the debtor, it shall be the duty of the official receiver—(*a*) To investigate the conduct of the debtor and to report to the Court, stating whether there is reason to believe that the debtor has committed any act which constitutes a misdemeanour under this Act or any enactment repealed by this Act, or which would justify the Court in refusing, suspending or qualifying an order for his discharge; (*b*) To make such other reports concerning the conduct of the debtor as the Board of Trade may direct; (*c*) To take such part as may be directed by the Board of Trade in the public examination of the debtor; (*d*) To take such part and give such assistance in relation to the prosecution of any fraudulent debtor as the Board of Trade may direct." It is plain from an examination of that section that the duty of the official receiver is a wide one and is to be exercised in the interests of the public. The correlative duty of the debtor after the report has been made, and when the consideration of his possible discharge is before the Court, is to establish that he is entitled to his discharge, which cannot be granted unless certain conditions are fulfilled; and, not to read the whole of s. 26, it is sufficient to say that "the Court shall refuse the discharge in all cases where the bankrupt has committed any misdemeanour under this Act, or any enactment repealed by this Act, or any other misdemeanour connected with his bankruptcy, or any felony connected with his bankruptcy, unless for special reasons the Court otherwise determines," and then on proof of certain matters the discharge necessarily is suspended.

It has been laid down by Phillimore J. in *In re Atherton* (1), and I agree with his decision, that in the course of the public examination of a debtor the debtor is not entitled to refuse to answer questions put to him on the ground that the answers thereto may incriminate him, the purpose of the Act being to secure a full and complete examination and disclosure

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of the facts relating to the bankruptcy in the interests of the public and not merely in the interests of those who are the creditors of the debtor.

Bearing those principles in mind, we find that in the present case the debtor under his name of Richard Paget, a name which he uses but which he did not acquire at his birth, made certain answers on his earlier examination on December 21, 1926. He told the examiner that he had been in the army during the war in 1916 and in the 1st Battalion, City of London Regiment (The Royal Fusiliers), T.A. He gave a number of other answers on that date. Afterwards, on February 7, 1927, he made a written statement in which he revealed these important matters: "My full and true name is Vivian Percy Broughton, but I have been known for the past twenty years as Richard Paget, and I was born in Naples of British parents in 1887 or 1888. I can produce no documentary evidence of any kind with regard to my birth and nationality nor can I produce any papers relative to my military service. I have never seen a copy of my birth certificate. I am identical with the person charged at Brighton on November 10, 1908, and sentenced to a term of imprisonment," and he stated that he had certain money at certain times in his possession. When the examination was resumed on March 8 he gave the following further answers, which are important: "Are you identical with the person of that name"—that is, Vivian Percy Broughton—"who was proceeded against in the Brighton Court? (A.) Yes. (Q.) On two occasions, namely, on November 10, 1908, when there was a conviction and sentence? (A.) Yes. (Q.) And again in January, 1915, when there was a charge brought against you? (A.) Yes. (Q.) In the same Court? (A.) Yes. (Q.) You told the Court on the last occasion that your true and full name was Richard Paget? (A.) By that name I have been known for twenty-five years. (Q.) Have you ever used the name of Richard Paget before November 10, 1908? (A.) About 1902 or 1903 I first used the name of Paget." That would be when the debtor was about fifteen or sixteen years old and at a time, if and so far as the statements

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previously made were true, when he was living with an uncle. It is quite clear that inasmuch as the original statements made on December 21 were both incomplete, inaccurate, and, as to some of them, untrue, it was very necessary for the examiner to probe the statement which was made on February 7 and to go through the life of the debtor in order to ascertain what were the true facts. Some allegation is made that there was a large transaction in respect of which it was necessary to clear up details. He was then questioned as to his enlisting at the time of the war, and was asked: "(Q.) Have you any means of proving you were in the army at all? (A.) The regiment can prove it. (Q.) Can you produce the evidence for me? (A.) No. (Q.) What has become of your army papers? (A.) They are with the regiment. (Q.) Will you undertake to produce some evidence that you were in the army? (A.) No. (Q.) That you cannot do? (A.) I will not. It is not a military tribunal here. (Q.) I am asking these questions with a view to ascertaining what you have been doing before your bankruptcy. I take it you swear positively here to-day you were serving in the First Battalion of the London Fusiliers from 1916 to December, 1918? (A.) Yes. (Q.) In what name did you enlist? (A.) That is entirely my own affair." That question is the question which was put and which the registrar, whose discretion is a wide one, said that he certainly ought to answer. He declined to answer that question.

It appears to me that upon those facts and those materials it would be quite impossible for the report to be made in accordance with s. 73 or for the questions of the discharge of the debtor to be determined under s. 26 unless this lacuna in the life of the debtor was disclosed.

The matter was reported to Clauson J. and he, no doubt from motives of compassion, was minded to see whether or not the debtor could under those circumstances be excused from being compelled to answer the question, and he took the debtor into his room and made some examination of him in the absence of the official receiver, who was, of

course, not only entitled, but bound by his duty to obtain knowledge of the affairs of the debtor throughout the whole of his course. The learned judge came to the conclusion that he would make no order in the circumstances compelling the debtor to answer this question, although he did not in any way challenge the decision of the registrar that the question could be legitimately put.

Sect. 15 deals with the public examination of the debtor and by sub-s. 8 provides: "The debtor shall be examined upon oath, and it shall be his duty to answer all such questions as the Court may put or allow to be put to him." The registrar had allowed the question to be put to him. Clauson J. in no way disagreed with that exercise of discretion by the registrar, but after he had had his interview with the debtor he determined to make no order, and the form of the order of March 14 is this: "And the Court not being satisfied that disclosure of the name would secure further assets or rights to the creditors and being satisfied that there were serious personal reasons why it would be very much to the detriment of the debtor to answer, this Court doth make no order." In my opinion Clauson J. in coming to that conclusion failed fully to appreciate the situation. It appears to me that with regard to the latter portion of the statement in the order that "being satisfied that there were serious personal reasons why it would be very much to the detriment of the debtor to answer" the learned judge overlooked the principle which is the basis of the decision in *In re Atherton* (1), and it is probable that he did not have his attention drawn to that case or to the principles of which it is an illustration.

To my mind the principles are plain, although it is useful to look at an illustration such as is to be found in *In re Atherton*. (1) But the earlier basis which the learned judge gives for his decision seems to me one which is not a sure foundation: "the Court not being satisfied that disclosure of the name would secure further rights or assets to the creditors." That is not a complete survey of the rights or

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duties which fall upon the official receiver and the examiner. Moreover, it is not necessary that the Court, when the question is put, should be satisfied by those who are putting it that disclosure of the name would secure further assets or rights to the creditors. I think it may rather be said that before the question can be disallowed the Court has to be satisfied that the answer could not secure any further assets or rights to the creditors or any protection to the public. At any rate, it appears to me that the ground upon which the decision is put is insufficient, and certainly excludes a side of the bankruptcy law which we are constantly affirming in this Court, where it has been necessary over and over again to point out that in matters of bankruptcy it is not merely the creditors who have their rights, but it is also the public themselves whose interests have to be safeguarded. As I have said, it is quite easy to make too much of a matter of this sort. It appears to me that the course which was adopted by Clauson J. was unsatisfactory, and I think the right course will be to remit the case to him. We are clearly of opinion that the question ought to be answered, that the debtor has no ground for refusing to answer it, and that he cannot rely on the ground on which he relied before the registrar and again in this Court that to answer it might either cause him personal inconvenience or possibly incriminate him. After these observations I think that when the matter comes again before Clauson J. he will probably say that the debtor ought to answer the question and then make an order which has been known to be made in such cases before now, giving the debtor time by allowing a few days to elapse between the affirmance of the order that he shall answer the question and the resumption of the examination, so that the debtor can reconsider his position and give a full answer to the question, and, more than that, in his own interest, make a full disclosure of matters which are necessary to be known in order that his dealings and proceedings may be fully probed. It is in the interest of the debtor, after what has happened, that the disclosure should be complete. The debtor will not fail to appreciate that

after the evidence he gave on December 21, after the disclosure he made in the statement, and after the answers given at the resumed examination, a burden rests upon him of giving full information to the official receiver for the purpose of clearing up matters which undoubtedly require both clearing up and a fuller disclosure on his part.

SARGANT L.J. I am of the same opinion. After a fuller discussion of the matter than probably took place before the learned judge, and after our attention has been called to *In re Atherton* (1), it seems to me that neither of the reasons stated by the learned judge in his order as reasons for declining to order the bankrupt to answer the question was a sufficient reason.

LAWRENCE L.J. I agree. In order to enable the official receiver to perform his duty under the Act I am of opinion that he is not only entitled but bound to find out what the debtor was doing between 1916 and 1919 and under what name he was passing during that period. It also seems to me—and I now speak without knowing what the personal reasons which the debtor gave to the learned judge for not answering the question were—that the reason given to this Court that it might hurt him in connection with certain threatened proceedings about a ship with which he had dealings not only does not excuse him from answering the question but seems to me to afford strong ground for compelling him to answer. In these circumstances I agree that the case should go back to the learned judge, and I concur in the statement made by Sargant L.J. that probably we have heard more than the learned judge did of the reasons why this answer should be given. (2)

Appeal allowed.

Solicitor for official receiver and Board of Trade : *Solicitor to Board of Trade.*

(1) [1912] 2 K. B. 251.

(2) On May 9, 1927, the case came on again before Clauson J., when the debtor in answer to the question in what name he enlisted stated that he enlisted in the name of Vivian Percy Broughton, but that he did not know what his regimental number was.

W. I. C.

ASTBURY J.

1927

April 1.

In re CLIFF CONTRACT.

[1926. C. 4356.]

Vendor and Purchaser—Land—Appointment of statutory Trustees by Trustees for Sale—"Persons interested in more than an undivided half of the land or the income thereof"—Appointment Valid—Law of Property Act, 1925 (15 *Geo.* 5, *c.* 20), *Sch. I., Part IV., s.* 1, *sub-s.* 4 (*iii.*) (*iv.*).

Where, under s. 1, sub-s. 4, of Part IV. of Sch. I. to the Law of Property Act, 1925, land is vested in the Public Trustee upon the statutory trusts, cl. (iii.) provides that : "any persons interested in more than an undivided half of the land or the income thereof may appoint new trustees in the place of the Public Trustee . . . . and thereupon the land shall by virtue of this Act vest in the persons so appointed . . . . upon the statutory trusts."

Where land was held in four equal undivided shares, the owner of one share and the trustees for sale of the three remaining shares appointed new trustees in the place of the Public Trustee :—

Held, that the trustees for sale were "persons interested in more than an undivided half of the land or the income thereof," and that the appointment of new trustees was valid.

By a deed, dated March 1, 1910, certain property was conveyed to William Cliff, Joseph Cliff, Walter Cliff and Stephen Cliff in fee simple in equal shares as tenants in common. By his will, dated October 3, 1911, Joseph Cliff devised and bequeathed his residuary real and personal estate to his trustees upon trust for sale. He died on June 9, 1914. Walter Cliff, by his will, dated September 22, 1916, devised and bequeathed his residuary real and personal estate to his trustees upon trust for sale. He died on March 1, 1917. By his will, dated August 20, 1915, William Cliff devised and bequeathed his residuary real and personal estate to his trustees upon trust for sale. He died on January 19, 1927. Stephen Cliff still survived. Under these circumstances the property vested in the Public Trustee on January 1, 1926, under Part IV., Sch. I., to the Law of Property Act, 1925. By an agreement, dated September 6, 1926, Stephen Cliff and a trustee of each of the wills of Joseph Cliff, Walter Cliff and William Cliff agreed to sell and the purchasers agreed to purchase certain freehold property, in which was comprised the property the subject

of the deed of March 1, 1910. By a deed, dated October 1, 1926, Stephen Cliff and all the trustees of the three wills, in exercise of the power conferred on them by the Law of Property Act, 1925, appointed the vendors to be trustees in place of the Public Trustee of (inter alia) the property comprised in the contract for sale for all the purposes of the Act.

The purchasers objected to the title of the vendors on the ground that the trustees for sale of the three wills were not included in the description of persons interested in more than an undivided half of the land or income thereof within the meaning of s. 1, sub-s. 4 (iii.), of Part IV. of Sch. I. to the Law of Property Act, 1925, and that accordingly the appointment of trustees in place of the Public Trustee was ineffectual.

Under these circumstances this vendor and purchaser summons was issued, under s. 49 of the Law of Property Act, 1925, by the vendors asking for an order that the objections of the purchasers to the title of the property had been sufficiently answered by the vendors, and that a good title to the property had been shown.

Topham K.C. and *Bradley Dyne* for the applicants. On January 1, 1926, the land in question here vested in the Public Trustee on statutory trusts under the provisions of s. 1, sub-s. 4, of Part IV. of Sch. I. to the Law of Property Act, 1925, but by cl. (iii.), power is given to any persons interested in more than an undivided half of the land or the income thereof to appoint new trustees in his place. The purchasers have objected that the trustees are not "persons interested" within the meaning of cl. (iii.). Surely that contention cannot be upheld? The persons who can appoint under cl. (iii.) are the persons who can apply to the Court under cl. (iv.), and the trustees must be "interested" within the meaning of that clause. The words "persons interested" mean persons interested beneficially or as trustees or in any other way. In *Darlington* v. *Darlington* (1) trustees for sale

(1) [1926] W. N. 192.

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were treated as "persons interested" within the meaning of sub-s. 11 (i.) of s. 1 of Part IV.

Sir Arthur Underhill and *Walter Banks* for the respondents. Sect. 35 of the Act of 1925 is very material, as showing that "persons interested" must mean "beneficially interested," and not trustees. The trustees ceased to be trustees after January 1, 1926. How then can they be said to be "persons interested"? They are cut out altogether. Sect. 35 does away with the trustees powers completely.

Topham K.C. in reply. If trustees are not "persons interested," then clauses (i.), (ii.) and (iii.) of s. 1 of Part IV. are wiped out altogether and become meaningless.

ASTBURY J. This is a vendor and purchaser's summons raising a question on Part IV. of Sch. I. to the Law of Property Act, 1925.

The contract in question is dated September 6, 1926, and is made between four persons called the vendors and the purchasers, and is an agreement in ordinary form to sell part of the larger estate. The vendors were appointed trustees by a deed of October 1, 1926, by which the surviving tenant in common and the three sets of trustees for sale purported under the powers of Part IV. to appoint the vendors trustees holding upon the statutory trusts in place of the Public Trustee, in whom the property comprised in the contract had become vested upon the Law of Property Act, 1925, coming into effect.

The sole question is whether or not the vendors were validly appointed trustees within the meaning of Part IV.

Part IV., s. 1, begins: "Where, immediately before the commencement of this Act, land is held at law or in equity in undivided shares vested in possession, the following provisions shall have effect." Sub-sects. 1, 2, 3 do not apply to this case, but sub-s. 4 is applicable. [His Lordship read sub-s. 4 and continued:] There is no doubt that the land in question vested in the Public Trustee under sub-s. 4, and that the legal estate passed to him, but under cl. (i.) he could not act as trustee, unless requested so to do "by or

on behalf of" persons interested. That has not happened. Clause (iii.) is relied on by the vendors. Under cl. (iv.) parties interested may apply to the Court for the appointment of trustees in the place of the Public Trustee. That has not been done, and the persons interested here wished to be spared the necessity of making such an application. The question appears to turn on this—whether these three sets of will trustees and the surviving tenant in common are or are not together "persons interested in more than one undivided half of the land or the income thereof." If they are so interested, then the appointment of the vendors as trustees is good; if they are not then it is invalid.

Counsel for the purchasers suggest that the words "persons interested" within the meaning of sub-s. 4 mean "persons beneficially interested," the effect of which contention, if correct, would be that "persons beneficially interested" under these complicated wills must be found, who with the surviving tenant in common can make up the necessary "persons interested." This does not trouble the purchasers, as they say that, if this is impossible, application must be made to the Court to appoint trustees.

The vendors contend that sub-s. 4 must be read as meaning what it says, and that it is impossible to say that these trustees for sale are not persons interested. There may be a difficulty in saying that they are now interested in the land, after it has vested in the Public Trustee, but there can be no question that they are interested in the proceeds. It is very likely that the draftsman intended the words "persons interested" to mean the same as they do in s. 35, after the land has been sold. I am inclined to think that "persons interested" must have been intended to mean persons who were so interested before Part IV. took effect. If it is not so, I think that the persons making the appointment of the vendors as trustees were undoubtedly interested in the income of the land to a greater extent than one-half.

There is one matter to which I must refer. It is contended on behalf of the purchasers that the effect of Part IV. is not only to vest the legal estate in the land in the persons made

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trustees upon the statutory trusts, but takes away from the trustees for sale under the wills all their rights. I cannot think that the framers of the Act meant anything of the kind. It seems to me most alarming to suppose that Part IV. has the effect, in cases coming within its scope, of destroying all the provisions contained in wills, under which the property was previously held. Fortunately, I have not to consider that question, but only whether the vendors have been duly appointed trustees within the meaning of Part IV., s. 1, sub-s. 4. In my opinion they were so appointed, and the purchasers' objection fails.

Solicitors: *Linklaters & Paines, for Scatcherd Hopkins & Brighouse, Leeds.*

P. J. B.

ROMER J. 1927 *April* 1, 6.

Ex parte BURDETT COUTTS.

[1882. A. 3178.]

Compulsory Purchase of Land—Title by Possession—Payment of Purchase Money into Court—Irregular Procedure—Payment out—Lands Clauses Consolidation Act, 1845 (8 & 9 *Vict. c.* 18), *ss.* 69, 76, 79.

In 1868 a sum of money was paid into Court under the provisions of the Lands Clauses Consolidation Act, 1845. At the time of the notice to treat W. T. was in possession of the land and apparently claimed to be the person absolutely entitled thereto. The promoter, however, not being satisfied as to his title and taking the view that the children (if any) of three women all married before 1842 would take an interest in the property under a will made in that year, paid the money into Court. The payment in and the assessment of compensation were not made in accordance with the correct procedure. In 1926 an application was made by the legal personal representative of W. T. that the fund might be paid to him as such legal personal representative. No claim was at any time made under the suggested adverse title:—

Held, that as the provisions of the Lands Clauses Consolidation Act, 1845, had not been complied with, s. 79 of that statute could not have any application to the present case; that, in the circumstances in which the money had been paid into Court, it was money to which the person with whom the contract was made was entitled, subject to his title proving to be a defective title; that his title had not been proved to be defective and that the application must be granted.

Ex parte Winder (1877) 6 Ch. D. 696 considered and applied.

SUMMONS.

ROMER J.

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In 1868 the Baroness Burdett Coutts was desirous of acquiring, under the powers of the Lands Clauses Consolidation Act, 1845, certain land for the purposes of her undertaking. Notice to treat was duly served on one William Thomas, who was at that time in possession of the land and who apparently claimed to be the person absolutely entitled thereto. He agreed the compensation to be paid to him for his interest at the sum of 547*l.* When his title came to be examined the promoter was not satisfied with it, taking the view that, under the terms of a certain will, the children, if any, of three ladies would take an interest in the property after the death of their mother. Each of these three ladies was married before 1842. The promoter, therefore, paid the money into Court to the credit directed by s. 69 of the Lands Clauses Consolidation Act, 1845—namely, to the credit "Ex parte Angela Georgina Burdett Coutts in the matter of the Columbia Bethnal Green Market and Approaches Act, 1866," and thereupon took a conveyance from William Thomas of the land as being a conveyance by the person who was absolutely entitled.

An application was made in 1869 for payment out of the money. This application was refused on the grounds that either all the three ladies were then living or, if not, that no evidence had been adduced that they were dead and that there was no evidence that there were no children of their respective marriages. A similar application was made and refused in 1894. In 1926 the present application was made by the legal personal representative of William Thomas for payment out of the fund.

Droop for the applicant. The title of the account is in accordance with payment in under s. 69 of the Act of 1845, and not in accordance with that of an account as paid in under s. 76 of that statute. The party in possession was entitled to the reversion in fee unless the three ladies had children: see s. 79. It is impossible that any of the three ladies, each of whom was married before 1842, should have

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any future born children. If a person has some title and is not under a disability he can accept the purchase-money. The nearest case is *Ex parte Winder* (1), a case dealing with payment in under s. 76. By analogy the promoters in the present case acquired nothing but the interest of William Thomas, whatever that interest was. It is not necessary to wait until the ultimate limit of possible disabilities has been reached. It is not the practice of the Court to keep petitioners out of their money because of a possible shadowy claim which might be made: *Gedye* v. *Commissioners of Her Majesty's Works and Public Buildings* (2); *In re Harris* (3); *Ex parte Chamberlain.* (4)

J. N. Gray for the respondents, the legal personal representatives of the promoter. *Ex parte Winder* (1) does not appear to govern the present case. There is no real proof with reference to the existence of children of these ladies. They have had no opportunity of claiming, and conceivably some one might claim whose right has not been barred by statute.

ROMER J. This is rather a troublesome matter. It is an application for payment out of Court of a sum of money which was paid into Court "Ex parte Angela Georgina Burdett Coutts in the matter of the Columbia Bethnal Green Market and Approaches Act, 1866, and in the matter of the Lands Clauses Consolidation Act, 1845." That money was paid into Court as long ago as December 5, 1868, and it was paid in under these circumstances. The Baroness Burdett Coutts, who was the promoter, was given power of acquiring land compulsorily for the purposes of the Act, the provisions of the Lands Clauses Act being incorporated. Part of the land that was required for the purposes of the Act was some land which had been devised by the will of one William Begarnie made in the month of November, 1842. He died in the same month, and by his will he had devised this land

(1) 6 Ch. D. 696.
(2) [1891] 2 Ch. 630.
(3) [1901] 1 Ch. 931; [1909] W. N. 181.
(4) (1880) 14 Ch. D. 323.

to his wife for life and after her death to his three daughters "to be equally divided between them and amongst them share and share alike as tenants in common and not as joint tenants"; and those three daughters were referred to in the will by name, being described in each case as being the wife of a particular man. But the will contained a declaration as follows: "The bequests hereby made to my said daughters shall be for their own absolute use and benefit and shall not be subject or liable to the control debts or engagements of their said husbands or either of them or any future husband with whom they may intermarry, but shall be settled upon them and their children absolutely." The widow died in the month of February, 1852, and in the years 1854 and 1855 the three daughters, being still married women, by deed properly acknowledged purported to convey to one Samuel Drew the whole of the property in fee simple—the daughters, in other words, treated themselves as being absolutely entitled to the property in question, disregarding the direction that the property should be settled upon them and their children. Samuel Drew in the year 1857 conveyed the whole of the land for valuable consideration to one William Thomas, and in the year 1868, when the land was required for the purposes of this Act, to which I have referred, William Thomas was in possession of the land, claiming apparently to be in possession as the person absolutely entitled thereto.

Now in due course notice to treat was served upon him and he agreed the compensation to be paid to him for his interest at the sum of 547*l*. When his title came to be examined, however, the Baroness Burdett Coutts was not satisfied with it, taking the view no doubt that the children, if any, of each of the ladies would take an interest in the property after the death of their mother. Subject to the daughter dying without issue she would no doubt take an absolute interest in her share. So that William Thomas was, as he claimed to be, absolutely entitled to the property in question, but subject to the possibility, which he apparently had overlooked, that if either of the daughters had a child or children that child or those children would be interested.

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In those circumstances there was only one course properly open to the Baroness. She ought to have proceeded under s. 69 of the Lands Clauses Act, which is the section dealing with the case where the land taken by the promoters of the undertaking is vested in a tenant for life or other person not having an absolute interest, and ought under that section to have had the compensation money properly ascertained in the manner provided by the Act, William Thomas not being competent to come to an agreement in relation to it. She should then have paid the money into Court to the credit to which in fact she did pay it, and thereupon William Thomas, in pursuance of the powers conferred on a tenant for life and other limited owners by the Lands Clauses Act, could have conveyed to her the fee simple of the property in question. Instead of pursuing that course, however, she paid into Court to the credit I have mentioned the 547*l.* and thereupon took a conveyance from William Thomas of the land, the conveyance not being expressed to be made in pursuance of the powers given to a limited owner, but being a conveyance by him as though he were absolutely entitled. William Thomas could not have conveyed under the Act in pursuance of the powers thereby conferred on persons having only a limited interest, because he had not taken the steps pointed out by the Act of having the compensation money ascertained in such a way as to be binding on all persons interested in the land.

Now the money having been so paid into Court, William Thomas in the year 1869 presented a petition for payment out to himself of the money and that petition came before James V.-C., and he somewhat naturally declined to make an order for payment out to William Thomas, there being no reason at that time for supposing that, even if the ladies had no children then, they might not have them in the future.

The Vice-Chancellor, however, directed the interest to be paid to William Thomas, there being no evidence to show that the three ladies were not still living. There was a later application in 1894 for payment out of Court. I have no

information as to what passed in Court on that occasion, except that no order was made. But those claiming through William Thomas both in the capacity of heir at law and as persons interested in his personal estate have now presented a petition asking for payment out to them of the capital sum. Now all these ladies were married before November, 1842. There is not indeed any proof of their death, but it is most improbable that any one of them should be living at the present time, because a period has now elapsed of eighty-five years since 1842, and, assuming that they married even at the age of sixteen, the youngest, if living, would be about 101 years of age. I think therefore we may safely assume that the ladies are dead, and it seems probable that they have been dead for many years. That is not, however, in itself of great importance. The real question of importance is whether any of them had any children. If they had, then under the will there can be little doubt that they would have taken an interest in the land. Any such interest would, however, prima facie have been barred twelve years after the mother's death.

Now the present applicant has put the case in two ways: He says first of all that I ought to direct payment out to him under s. 79 of the Act. That section is as follows: "If any question arise respecting the title to the lands in respect whereof such monies shall have been so paid or deposited as aforesaid, the parties respectively in possession of such lands, as being the owners thereof, or in receipt of the rents of such lands, as being entitled thereto at the time of such lands being purchased or taken, shall be deemed to have been lawfully entitled to such lands, until the contrary be shown to the satisfaction of the Court; and unless the contrary be shown as aforesaid, the parties so in possession, and all parties claiming under them, or consistently with their possession, shall be deemed entitled to the money so deposited, and to the dividends or interest of the annuities or securities purchased therewith, and the same shall be paid and applied accordingly." Now under that section orders have from time to time been made for payment out in such circumstances as the following.

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A man is found to be in possession of land required for the purposes of the special Act without any documentary title, but without having been in possession for a sufficient number of years to have given him a title under the Statute of Limitations. The compensation money is accordingly paid into Court under s. 76, it being unknown who is the owner of the property. In such cases as that after a sufficient further time has elapsed from the time of payment in to make the necessary twelve or twenty years, as the case may be, under the Statute of Limitations, an order has been made for payment out to the man who was in possession at the time the money was paid into Court, no claim having been made in the meantime on behalf of the true owner of the land. It is not altogether easy to see how such a person can be said to have been in possession of the land "as owner thereof" unless those words are treated as meaning "as claiming to be the owner thereof."

But in a case that came before the Court of Appeal of *Gedye* v. *Commissioners of Her Majesty's Works and Public Buildings* (1), the person who was in possession at the time the land was taken was a person who at that time seemed to have been claiming to be in possession as the owner thereof, but on investigation of his title it appeared that he was in possession of the land by virtue of a long term of years which had not then expired. The Court held that he was not a person who was in possession of the land "as being the owner thereof" at the time the land was taken, and so when after twelve years had elapsed from the expiration of his term he applied for payment out his application was dismissed. It follows from that case, as it seems to me, that the mere fact that the person in possession claims to be there as the owner thereof is not sufficient to bring him within the section if in point of fact it turns out that he was rightly in possession under a title less than one that gave him complete ownership. If therefore this money had been paid in in strict accordance with the Lands Clauses Act, s. 76, I do not think I could have directed payment out to the present applicant under s. 79,

(1) [1891] 2 Ch. 630.

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because it would appear that William Thomas at that time was, or might have been, in possession of the land rightly—not as the owner thereof, but by virtue of the limited interests of the daughters which he had acquired. The money in this case was not, however, paid into Court in pursuance of the provisions of the Lands Clauses Act, 1845, and accordingly s. 79 cannot have any application to the case. But the applicant contends that, in spite of this, the money should be paid out to him upon the analogy of *Ex parte Winder*. (1) Now it does seem at first sight as though the Court might properly treat money paid into Court as merely representing the interest of William Thomas in the land, whatever that interest might be; and, that being so, that it might have been paid out to him almost immediately after the money had in fact been paid in. But as I have already stated, James V.-C. refused to make such an order in the absence of persons representing those who were interested in saying that the land was theirs rather than William Thomas's. A similar application was refused in 1894. Why were those applications refused? It seems to me for the reason given in *Ex parte Winder* (1) before Hall V.-C. For although he treated the money as being paid in as representing the interest of Hollingsworth, there is a passage in his judgment that indicates that the money should be treated as having been paid into Court for the protection of the undertakers against any claim that might be made to the land in question by the real owner of the land. He said (2): "It appears to me that the money so paid must be taken to have been paid in as the price agreed upon and the purchase-money payable to the person with whom the contract was entered into." In this case it would be William Thomas. But then he adds this qualification: "subject only to his title proving in the event to be a defective title, either by reason of his" —that is obviously a misprint, the word "his" must be referring to some third party, that is to say, the person who was the true owner of the land—"having a right to proceed against the railway company for the land itself (which right

(1) 6 Ch. D. 696. (2) 6 Ch. D. 703.

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apparently is now gone) or in respect of some such outstanding interest as that which I have referred to. . . . ." I need not trouble to pursue the rest of his observations.

Now it will be observed that the Vice-Chancellor thought that the money ought to be paid out to the person with whom the contract had been made, that is in this case William Thomas, subject only to the title of William Thomas " proving " to be a defective title, by reason of some other person having a right to proceed against the land itself. It is not suggested that there is any such outstanding interest as the Vice-Chancellor referred to. In my opinion it is not proved that the title of William Thomas was defective in this sense. No claim has ever been made to the land or to the money in Court by any person claiming to be a child or claiming through a child of any of these three daughters. Had William Thomas continued in possession of the property he would now clearly have obtained a good title under the Statute of Limitations, unless it could be shown that the rights of those who were interested in claiming the property after the deaths of the daughters had not been barred by the statute by reason of some disability or of their title being reversionary until a date within the statutory period. If that could be shown no doubt William Thomas's title would have been a defective one. But it has not been shown, and the undertaker's title to the land is now, for anything shown to the contrary, quite unimpeachable. In these circumstances, seeing that the money has now been in Court for fifty-nine years, I think, following *Ex parte Winder* (1), I ought to direct payment out on the ground that in the circumstances in which the money was paid into Court it was money to which the person with whom the contract was made was entitled, subject only to anybody who was interested in resisting the payment out being able to prove satisfactorily to the Court that the title of William Thomas or those claiming through him is defective in the sense referred to by Hall V.-C. Inasmuch as that has not been proved to my satisfaction I think I am

(1) 6 Ch. D. 696.

justified, according to that decision, in directing payment out to the present applicant. ROMER J. 1927 BURDETT COUTTS, *Ex parte.*

Solicitors for the applicant: *Phillips & Cummings.*
Solicitors for the respondents: *Lawrence, Graham & Co.*

J. L. D.

THE MAYOR, ALDERMEN, AND BURGESSES OF THE BOROUGH OF SUNDERLAND *v.* PRIESTMAN.

TOMLIN J. 1927 *April* 5, 12.

[1925. S. 3818.]

Local Authority—Street—Frontager—Expense of making up—Road previously made by Local Authority under Contract when outside their District—Estoppel—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *ss.* 150, 252, 257.

Performance of a statutory duty, or exercise of a statutory discretion, by a corporate local authority is not prejudiced by any prior action which that authority may have taken without aid from the statutes. No estoppel can arise in such a case.

The two remedies conferred by the Public Health Act, 1875, s. 257, are concurrent, and a local authority need not wait till the six months during which the summary remedy is available have expired before commencing proceedings to enforce the charge created by the section.

Tottenham Local Board v. *Rowell* (1880) 15 Ch. D. 378, 393 applied.

ADJOURNED SUMMONS.

By an agreement dated November 19, 1879, made between the Estates Committee of the Ecclesiastical Commissioners and the Sunderland Corporation the Ecclesiastical Commissioners agreed to convey to the corporation thirteen acres of freehold land at Roker in the parish of Monkwearmouth, Durham, for the formation with other land acquired from an adjoining owner of a public park. The consideration for this was the provision by the corporation of a sum of 2500*l.* for the erection by them to the satisfaction of the Commissioners' surveyor of a bridge and road over the Roker Gill and the making to the like satisfaction of three new roads forty feet wide—namely, a road over the bridge from A to B on the plan attached to the agreement, a road from

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B to D on the plan and a road from D to C on the plan, such roads and bridge to be dedicated to the use of the public within one month from their completion.

And the agreement provided that as the Commissioners intended to lay out the lands on the north side of the road from B to D, and on the west side of the road from D to C, for sale in building sites, the Commissioners agreed that whenever (at any time before the expiration of twenty-one years) the Commissioners should sell or convey any building site fronting on the road from B by D to C they would sell or convey the same subject to an agreement on the part of the purchaser or grantee to pay to the corporation such a proportion of one moiety of the expenses incurred by the corporation in making and completing the same as the extent of frontage of the same land bore to the whole length of the road.

By a lease dated June 12, 1885, the Commissioners demised to one Robert Shadforth on building lease a plot of land containing 1 acre 2 roods fronting on the road from B to D (which road was subsequently called Side Cliff) for the term of 999 years from June 24, 1883, at the rent of a peppercorn until September 29, 1884, and thereafter at the yearly rent of 53*l*. The lease contained (amongst others) covenants by the lessee that he would :—

(1.) Pay all taxes duties charges assessments impositions and outgoings including all costs of and rates for paving draining or other improvements or works upon or under the said plot of land or any road or roads then or thereafter abutting upon or adjoining the land demised and which any local board or other local authority might lawfully require to be borne or paid by the owner or occupier ;

(2.) "Within 12 months from the date of these presents (if the road or roads abutting on the said plot or parcel of land or ground hereby demised is or are not taken over by the local authority before the expiration of that period) pave flag and channel such road or roads as far as the same are co-extensive with the said plot or parcel of land or ground. . . . ."

(3.) "Within 3 months from the date of these presents pay to the Mayor Aldermen and Burgesses of Sunderland their successors or assigns such a proportion of one moiety of the expenses incurred by the said Mayor Aldermen and Burgesses in forming making and completing the road" on which the plot abutted "as the extent of frontage of the plot or parcel of land or ground hereby demised to the same road bears to the whole length of the same road."

By a conveyance dated December 31, 1889, which was made pursuant to the above agreement of November 19, 1879, after recitals (amongst others) of this agreement and that the sum of 2500*l.* had not been paid to the Commissioners, but that part of it had been expended by the corporation in erecting the bridge over Roker Gill and making the road from A to B, which had been completed to the satisfaction of the Commissioners' surveyor and duly dedicated to the public, "but that the roads from B to D and from D to C have not yet been wholly completed by the corporation the concreting of the footpaths thereof having been by agreement . . . . deferred until such time as may be necessary in consequence of the erection of residences adjoining or abutting such roads respectively but the Commissioners are satisfied that the residue of the said sum of 2500*l.* will be expended by the corporation in forming making and completing the said last mentioned roads," and the Commissioners conveyed to the corporation the thirteen acres of land mentioned in the agreement for use as a public park, and by clause 12 the Commissioners covenanted with the corporation that "whenever at any time before the expiration of 21 years from the date hereof the Commissioners their successors or assigns shall sell or convey any building site or piece of land adjoining or fronting the said road from B by D to C they will sell or convey the same subject to an agreement on the part of the purchaser or grantee that the purchaser or grantee his heirs executors administrators or assigns will at the expiration of three months from the sale or grant and upon demand made in writing . . . . pay to the corporation their successors or assigns such a proportion of one

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moiety of the expenses from time to time incurred by the corporation in forming making and completing the said road and the concreting of the footpaths thereof as the extent of frontage of the said land to the said road bears to the whole length of the said road it being the intention of the parties hereto that the corporation their successors or assigns shall be recouped or paid by the purchasers or grantees of the land adjoining the said road one moiety of the expense of making the same and also of the cost of concreting the footpaths thereof the expense of forming making and completing the said road except such concreting of the footpaths thereof being paid at the time and after demand made as aforesaid and the cost of concreting the footpaths as aforesaid afterwards paid in like manner and after the like demand whenever the same shall be executed as aforesaid. . . . ."

Side Cliff and the other two roads did not become part of the borough of Sunderland until 1895. A house was duly erected on the plot demised to Robert Shadforth and was called Cliffside, and the defendant was a successor in title of that lessee.

On July 31, 1923, the corporation gave notice in writing pursuant to the Public Health Act, 1875, on the frontagers to Side Cliff (including the defendant) requiring them to level, pave, metal, flag, kerb and channel the said street within three months, and on their failing to comply with the notice the corporation executed the work at a cost of 1624*l.* 13*s.* 3*d.*

By a notice to the defendant dated March 4, 1925, the corporation surveyor, in pursuance of the Public Health Act, 1875, apportioned the sum of 388*l.* 8*s.* as the part of the above total payable by the defendant according to the frontage of Cliffside. This sum was afterwards reduced to 379*l.* 15*s.*, and a demand for payment was duly made on August 11, 1925.

This summons was taken out by the corporation on October 3, 1925, asking for an order declaring the said sum of 379*l.* 15*s.* with interest at 5 per cent. from August 11,

1925, and the costs of the proceedings to be a charge by virtue of the Public Health Act, 1875, s. 257, on the house and premises Cliffside.

Owen Thompson K.C. and *Bischoff* for the corporation. The corporation are claiming a charge under the Public Health Act, 1875, s. 257, on the defendant's property in respect of the cost of making up the portion of the road upon which those premises front, the corporation having done the work upon the frontagers failing to do so. Prima facie the corporation are entitled to the order, but the application is being resisted on a number of grounds. The main defence appears to be based upon the agreement of 1879 and the subsequent conveyance of 1889, but any arrangement in these documents was contractual and entered into at a time when the corporation was not the local authority for the area affected by them. It is difficult to see how they could affect the corporation's statutory powers under the Public Health Act, 1875, s. 150.

R. A. Glen for the defendant. The application to enforce the statutory charge is premature. The Public Health Act, 1875, s. 257, confers two remedies on the corporation, first, a summary remedy enforceable by virtue of s. 252 only over a period of six months from demand for payment, and, secondly, a charge which has to be enforced under the general law. It is contended that until the six months' period is exhausted the local authority cannot seek to enforce the charge but must pursue their summary remedy: *Barraclough* v. *Brown*. (1) Here the corporation have commenced proceedings to enforce the charge before the six months' period has elapsed, and their application ought to be dismissed.

[*Owen Thompson K.C.* referred to *Tottenham Local Board* v. *Rowell*. (2)]

Again, the defendant is entitled to rely on the fact that the sum of 2500*l.* agreed to be expended in the erection of the bridge and the making of the roads was not fully expended. That appears from the conveyance in 1889, in which it is

(1) [1897] A. C. 615. (2) 15 Ch. D. 378, 392, 393.

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recited that the whole sum has not been expended and that the paths of the unfinished roads have not been concreted. The paths in Side Cliff were never concreted, and the fair inference is that a sum remains in the hands of the corporation earmarked for completing the unfinished road. That being so, the corporation are estopped from denying that the roads were completed to their satisfaction. On this ground also the present application ought to be dismissed.

[TOMLIN J. I should have thought it impossible for the corporation to estop themselves from exercising their statutory discretion by any act done in a district of which at the time they were not the local authority.]

When a local authority make up a road and then become the local authority for the particular area, it should not lie in their mouths to say that they did not do it to their satisfaction : see *Barry and Cadoxton Local Board* v. *Parry*. (1)

TOMLIN J. This is an application by the plaintiffs, who are the Corporation of Sunderland, to enforce a charge upon a frontager in respect of expenses incurred in making up the road upon which the property of the frontager abuts, the charge being the statutory charge conferred by s. 257 of the Public Health Act, 1875, which provides that : " Where any local authority have incurred expenses for the repayment whereof the owner of the premises for or in respect of which the same are incurred is made liable under this Act or by any agreement with the local authority, such expenses may be recovered, together with interest at a rate not exceeding five pounds per centum per annum, from the date of service of a demand for the same till payment thereof, from any person who is the owner of such premises when the works are completed for which such expenses have been incurred, and until recovery of such expenses and interest the same shall be a charge on the premises in respect of which they were incurred." [His Lordship then stated the effect of the agreement of November 19, 1879, the lease of June 12, 1885, and the conveyance of December 31, 1889, and continued :]

(1) [1895] 2 Q. B. 110.

All those documents, the agreement, the lease and the conveyance fitted into each other; but it is plain that the lease is framed on the footing that besides the lessee's liability to repay pursuant to the contract of 1879 to the Corporation of Sunderland some part of the expense incurred by them in making up the roads, the lessee was also to be under a liability to pay to the local authority charges for paving and making up the road. It is quite plain that the lease was taken by the lessee on the footing that there would be those two co-existent liabilities, first, an obligation to pay the Sunderland Corporation pursuant to the contract obligations between the Sunderland Corporation and the Ecclesiastical Commissioners, and, secondly, a liability to pay the local authority the proper charges in respect of making up the road to the satisfaction of the local authority, so that the owner for the time being of that lease always held it upon the footing of being subject to those two obligations.

Now in 1895 these roads were included in the borough, and for the first time in 1895 the corporation became the authority in respect of these roads. It appears that shortly after that, on January 6, 1897, some question arose between the Ecclesiastical Commissioners and the corporation with regard to the repair of these roads, and as far as I can gather from the minutes and the correspondence referred to in the minutes, and the other evidence, what happened was that the corporation contributed one-half of such repairs in connection with roads, the Ecclesiastical Commissioners contributing another half, and at the same time the corporation made it plain that in doing that they were not intending to prejudice their rights or duties as the authority in regard to the upkeep of roads.

In those circumstances the authority recently affected to exercise the statutory powers conferred upon them by s. 150 of the Public Health Act, 1875, and having come to the conclusion that the road was not made up to their satisfaction, made up the road and apportioned the expenses in the ordinary way between the frontagers, and so far as the expenses have not been paid by the frontagers they

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claim a charge on the adjoining premises for the apportioned amount of the expenses. The defendant in this case has disputed the matter, and he resists the claim of the corporation substantially on two grounds. The first ground is this. It is said by Mr. Glen that inasmuch as the six months during which proceedings can be brought in a court of summary jurisdiction to recover the amount had not expired when the present proceedings were commenced, the plaintiffs were not then entitled to come to this Court to enforce their charge. I think that argument is based on a misapprehension of the effect of s. 257. That section seems to me to do two distinct things: it gives first of all a personal remedy which can be enforced in a court of summary jurisdiction within six months; secondly, it gives a statutory charge by way of security, and the effect of that statutory charge is to confer upon the local authority all those rights which are available to any chargee under a charge of a similar kind, that is to say, among other things, a right to come to this Court to enforce the charge. But the two remedies are concurrent and independent, and there is no obligation on the chargees to proceed to exercise their personal remedy before they enforce their charge; nor are they bound to wait until the expiry of the six months during which they can enforce the personal remedy before seeking to enforce the charge in this Court. It seems to me that this construction of the section is in accordance with the views of the Court of Appeal in *Tottenham Local Board* v. *Rowell* (1), and in particular of Brett L.J. who says: "There is a remedy against him personally for the whole sum, which remedy is to be enforced within six months; but if the Board claim the whole payment from him at once, yet fail to recover it from him personally, and there are no means of recovering it from him by distress, or if they pass by the personal remedy, then, if they have done nothing to prevent them from putting the charge into effect, I see no reason why the charge might not then and there be put into effect for the whole sum as against the owner." That passage seems to me to cover

(1) 15 Ch. D. 378, 393.

the present case precisely. The corporation have passed by the personal remedy, that is, have not seen fit to put it into force against the defendant, but instead they come here, as they are entitled to do, to enforce a statutory charge which is given to them without any fetter at all, a charge which they are entitled to exercise the moment it is conferred on them. That point seems to me therefore to fail.

The other point urged by Mr. Glen is this. It is said that in 1889 the corporation had not spent all the money which they were under an obligation to spend on the roads mentioned in the conveyance of that date, and that they have not spent it since; and it is argued therefore that they cannot be heard to say that these roads are not made up to their satisfaction, because it must be assumed against them that they have done everything that they ought to have done and made up the roads to their own satisfaction in the past, and spent all the money which they ought to have spent in doing so. This contention is based therefore on something in the nature of an estoppel. There are two answers to this. First, I am not satisfied that I can draw from the evidence any inference they have not spent all the money. Their obligation was to spend it upon the roads, and, among other things, in concreting the footpaths; and evidence that the footpaths of the roads from B to D were not concreted is not evidence that all the money was not spent, because for all I can tell the whole of the money may have been exhausted before the work on other roads, such as the road from D to C, had been completed. Therefore it seems impossible for me to draw the inference that the money was not spent. Secondly, it is to my mind immaterial whether it was spent or not. In my judgment no such estoppel against the local authority can be set up. In 1879 the corporation, not being at that time the local authority for this area, entered, as any individual or body may enter, into a contract under which they agreed to spend a sum of money in making up certain new roads to the satisfaction of the Ecclesiastical Commissioners and to nobody else's satisfaction at all. For the present purpose it is in my view immaterial whether they

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did or did not complete the roads; but let us assume that they did, and that they spent all the money and completed the road to the satisfaction of the Ecclesiastical Commissioners in the terms of their contract. Still, I am unable to see upon what principle this could be said to estop them from saying that the road now in question is not made up to their satisfaction within the meaning of s. 150. True they have in the past contracted to make it up to the satisfaction of the Ecclesiastical Commissioners; but the Commissioners' standard may be wholly different from the standard by which it is necessary for a local authority to work in exercising the statutory power under s. 150. It seems to me on this ground alone it would be impossible to hold that there was anything in the nature of estoppel. But I will go further than that, and I say without hesitation that where there is a public body having a statutory duty to perform, a statutory discretion to exercise of the kind indicated in s. 150, they can do nothing beforehand outside their statutory duty and acting as private contractors which can possibly be permitted to estop them from performing their statutory duty or exercising their statutory discretion. I think that on that ground alone, whatever be the true view as to the expenditure of this money, the defendant's second point must fail. I therefore hold that the applicants succeed, and are entitled to an order in the ordinary form.

Solicitors: *Sharpe, Pritchard & Co., for H. Craven, Sunderland; Cunliffe, Blake & Mossman, for W. Reay-Smith, Newcastle-upon-Tyne.*

H. C. G.

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CLAUSON J.

[1926. L. 1268.]

1927 *March* 1, 2, 3, 16.

Trade Mark—Assignment of Trade Mark—Assignment with Part only of Business—Inseparability of Business assigned—Action for Infringement—Motion to rectify Register—Trade Marks Act, 1905 (5 *Edw.* 7, *c.* 15), *s.* 22, *as amended by Trade Marks Act*, 1919 (9 & 10 *Geo.* 5, *c.* 79), *s.* 12, *Sch.* 2.

Sect. 22 of the Trade Marks Act, 1905 (amended by the Trade Marks Act, 1919), embodies in statutory form the principle, laid down in *Leather Cloth Co.* v. *American Leather Cloth Co.* (1865) 11 H. L. C. 523, 534 and recognized by s. 2 of Trade Marks Registration Act, 1875, and s. 70 of Patents, Designs and Trade Marks Act, 1883, namely, that a trade mark can be validly assigned only with the goodwill of the business concerned in the goods for which it has been registered.

F., the proprietor of an English registered trade mark in the form of a label under which he had for many years manufactured a pharmaceutical preparation in France and imported it into England, assigned the English trade mark to the plaintiffs by deed containing the words "together with the goodwill of the business concerned in the goods"; but F. continued as before to manufacture the preparation in France under the same label. The plaintiffs sought to restrain the defendant, who had purchased the pharmaceutical preparation from F. under the said label, from importing it into England in alleged infringement of the plaintiffs' registered trade mark. Defendant applied by motion to rectify the register by expunging the plaintiffs' registration:—

Held, that, according to the intention of the parties evidenced by the facts, the goodwill of the whole of F.'s business was not assigned; but that, even if it were, the plaintiffs must be treated as having abandoned the part of the business carried on in France. Therefore the mark not having been assigned in connection with the goodwill of F.'s manufacturing and vending business in France, as required by s. 22 of the Trade Marks Act, 1905, and having become deceptive owing to the plaintiffs' own conduct, the action failed and the mark must be expunged from the Register of Trade Marks.

WITNESS ACTION.

The facts, which in substance were not in dispute, were, as stated in the judgment of Clauson J., as follows:—

In the year 1907 Pierre Famel was manufacturing in France a pharmaceutical preparation known as "Sirop Famel," which was of the nature of a cold cure. He registered in England in 1907, in respect of "a pharmaceutical preparation for human use," the first mark being a label

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bearing prominently the words "Sirop Famel," and the initials P. F., a representation of certain medals, directions for use and so forth, surrounded by an ornamental border, the letterpress being in the French language. Since 1907, Famel, who carried on business in France, made the preparation in France, sold it in France under a label corresponding in almost every detail with the 1907 mark, and imported the preparation into England, where it was sold on his behalf by a firm of Wilcox Jozeau & Co., under Famel's 1907 mark. It appeared that in recent years, owing to the operation of the exchange between France and England, the price in France was a good deal less than that at which the preparation had been offered in England by Famel's selling agents. It therefore was profitable to English druggists to buy in France at the French price, import the preparation into England and sell it in England at a price below that at which Famel's selling agents offered it in England. Famel attempted to prevent that by placing on the carton containing each bottle sold in France a warning that the resale of the bottle was forbidden. Famel did not attempt, while registered owner of the 1907 mark, to enforce his rights, if any, against unauthorized importers of his preparation into England. He, however, in conjunction with another French gentleman, each taking one share, formed the plaintiff company on April 16, 1923, as a company limited by shares under the Companies Acts, 1908 to 1917, with a capital of 100*l.* divided into 100 shares of 1*l.* each with the object of importing "Sirop Famel" and other preparations and products of Pierre Famel of Paris from France for sale in Great Britain. The memorandum of association contained wide powers which probably would have authorized the manufacture by the plaintiffs of the preparation in England. It did not, at the commencement of the action, appear by whom the shares were held, but the Court treated the plaintiff company for the purpose of the case as a wholly independent concern at arm's length with Famel.

The plaintiff company having been formed entered into an agreement dated May 31, 1923, under which the company

were appointed sole wholesale agents for the sale of "Sirop Famel" in Great Britain until 1933, subject to the determination of the agreement by either party on three months' notice.

The course of business continued the same as before, save that, instead of Famel selling "Sirop Famel" in England through Wilcox Jozeau & Co., he sold it through the plaintiffs, they using "Wilcox Jozeau & Co." as a trade name.

On March 31, 1924, Famel wrote a letter to the plaintiffs in which he authorized them on his behalf to have the exclusive right to the use in Great Britain of, amongst others, the 1907 mark, and the letter stated that no person in Great Britain was authorized to import "Sirop Famel," except the plaintiffs and their duly appointed distributors Wilcox Jozeau & Co., and that all other persons attempting to import the product of Famel's manufacture were infringing his rights and were to be treated as illicit importers of his product.

On June 28, 1924, Famel executed an assignment, to which he and the plaintiffs were parties, whereby in consideration of the sum of 5*l.* paid to him by the plaintiffs, Famel assigned to the plaintiffs the 1907 mark "together with the goodwill of the business concerned in the goods with respect to which the said trade mark is registered." On September 4, 1924, in pursuance of an application received by the registrar on July 3, 1924, the plaintiffs, described as merchants, were registered as proprietors of the 1907 mark as from June 28, 1924, by virtue of that assignment.

On March 13, 1925, the plaintiffs applied for registration of the second mark, being in substance a translation of the 1907 mark, bearing, however, the statement that the plaintiffs were the sole proprietors in Great Britain and that the distributors in Great Britain were Wilcox Jozeau & Co., which was admitted to be a mere trade name used by the plaintiffs. The application for registration disclaimed the exclusive use of the word "Famel" and of the word "Famel's" and of the words and abbreviations "Wilcox Jozeau & Co." The mark was registered on April 27, 1926, and was entered on the register under s. 24 of the Trade

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Marks Act, 1905, as associated with the 1907 mark. The goods in respect of which the 1925 mark was to be used were described as "a pharmaceutical preparation for human use made in France"; and part of that mark consisted of the words "made in France."

After the assignment the plaintiffs continued to procure "Sirop Famel" from Famel in France and sold it in England, at first, under the 1907 mark, and subsequently, under the 1925 mark, but never themselves manufactured the preparation either in England or France. Since the registration of the 1907 and 1925 marks the defendant sold in this country "Sirop Famel" not emanating from the plaintiffs, but purchased in France, ultimately but not directly from Famel with the label which Famel used in France, which was practically the same as the 1907 label.

Evidence was given by retailers in this country which established to the satisfaction of the Court that retailers in this country recognized the 1907 mark as distinguishing Famel's manufacture. In the opinion of the Court any one who read either of the labels would think that the preparation was made in France by Famel, as in fact it was, and it was unlikely that any one reading the 1925 label would be deceived into thinking that the preparation was made in France by the plaintiffs, further, the 1907 mark was adapted to distinguish Famel's goods without any reference to the importer; the 1925 mark distinguished Famel's goods and was not adapted to distinguish goods made by the plaintiffs, but was adapted to distinguish such only of Famel's goods as passed through the hands of the plaintiffs.

The plaintiffs by their statement of claim charged the defendant with infringing their trade marks in that they sold as "Sirop Famel" a preparation not of the plaintiffs' merchandise in bottles and cartons bearing labels which were a colourable imitation of those marks, and claimed an injunction. The defendant pleaded that the 1907 mark, as used by him, was never distinctive of the importers, vendors or distributors of the preparation in the United Kingdom, but denoted that the preparation was the manufacture of Famel;

that the assignment to the plaintiffs was not of the goodwill attaching to the manufacture, with which Famel had never parted; that the assignment was therefore invalid as not complying with the provisions of s. 22 of the Trade Marks Act, 1905, and that the registration of the trade marks was invalid. The defendant accordingly served the plaintiffs with notice of motion for an order that the marks should be expunged from the register of trade marks.

Moritz K.C. and *J. H. Evans-Jackson* for the plaintiffs. The plaintiffs are the registered proprietors of the trade marks and their title cannot be impeached: the assignment to them in 1907 was a valid assignment: there was an assignment of the goodwill of the business concerned in the goods with respect to which the trade mark was registered according to the requirements of s. 22 of the Trade Marks Act, 1905. In *Inland Revenue Commissioners* v. *Muller & Co.'s Margarine* (1) Lord Lindley said: "Goodwill regarded as property has no meaning except in connection with some trade, business or calling. In that connection I understand the word to include whatever adds value to a business by reason of situation, name and reputation, connection. . . . . In this wide sense, goodwill is inseparable from the business to which it adds value, and, in my opinion, exists where the business is carried on. Such business may be carried on in one place or country or in several, and if in several there may be several businesses, each having a goodwill of its own." An article, such as this syrup, may gain a reputation in the market from a particular source of manufacture without the purchaser knowing the name of the manufacturer: *Birmingham Vinegar Brewery Co.* v. *Powell.* (2) It was always and still is lawful for the plaintiffs themselves to manufacture the syrup in England, instead of purchasing it from Famel. Sect. 22 contemplates severance of the goodwill upon assignment of the trade mark: the legislature recognizes that, in the proviso to that section and in s. 23. There may be a manufacturing monopoly and a vending monopoly, each of which may be

(1) [1901] A. C. 217, 235. (2) [1897] A. C. 710, 713.

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dealt with separately: *In re "Tarantella" Trade Marks* (1); *Reddaway* v. *Banham.* (2) The function of a trade mark is to indicate to a purchaser the manufacture or quality of the goods, to give an indication to his eye of the trade source of the goods or the trade hands through which they pass on their way to the market: *In re Powell's Trade Mark* (3), per Bowen L.J. Rights to use a trade mark may be concurrent, so that neither proprietor has an exclusive right to use the mark: *Robinson* v. *Finlay* (4); in that case the marks indicated goods either manufactured or bought by W. which passed through R.'s hands, who was responsible for their finish and packing. Severance of the business is recognized by s. 22 territorially and by s. 23, occupationally. Whenever a well known mark is assigned, confusion in the mind of the public is almost bound to ensue; and it was for that reason that the legislature provided that an assignment of a mark must be accompanied by the goodwill.

Sir Duncan Kerly K.C. and *Kenneth R. Swan* for the defendant. The plaintiffs are attempting to circumvent the rule that a trade mark cannot be assigned apart from the goodwill. An importer of goods manufactured abroad is not entitled to register the trade mark of the manufacturer. Under the agreement of May 31, 1923, the plaintiffs were appointed sole agents to import and sell in England, but not to manufacture the preparation. At that stage the position was similar to that in *Richards* v. *Butcher* (5), which shows that the plaintiffs, not being then the registered assignees of the trade mark, could not sue for infringement. The letter of March 31, 1924, did not alter that position. By the assignment the goodwill is assigned in language corresponding with s. 22 of the Trade Marks Act, 1905. Under that assignment the plaintiffs were not bound to acquire the goods from Famel. Although the assignment here was of trade marks already registered, the principle of *Pinto* v. *Badman* (6) applies—namely, the assignment of the mark

(1) (1910) 27 R. P. C. 573.
(2) [1896] A. C. 199.
(3) (1893) 10 R. P. C. 195, 200.
(4) (1878) 9 Ch. D. 487.
(5) (1890) 7 R. P. C. 288.
(6) (1891) 8 R. P. C. 181.

must be accompanied by an assignment of the goodwill of the business in the goods to which it belonged. Fry L.J. said (1): "A trade mark cannot be assigned when it is divorced from its place of origin, or when, in the hands of the transferee, it would indicate something different to what it indicated in the hands of the transferor." Even if there were an assignment of the goodwill of the manufactory, the plaintiffs did not, in fact, carry on the business of manufacturing the preparation to which the goodwill was attached and therefore the assignment was not an effectual assignment within the meaning of s. 22. The plaintiffs' object was merely to import and sell the article in England, and in the registration of the assignment they are described as merchants and not as manufacturers. After the assignment they do not call themselves the successors of Famel, and Famel continued to manufacture the article in France and to sell it there. True the goodwill of a business may extend to more than one country, and the proviso at the end of s. 22, added by the amending Act of 1919, expressly saves the rights of the proprietor of a trade mark to assign the trade mark rights in any country, but only in connection with the goodwill of the business therein. Here there is only one business and one goodwill, and that business is situate in France. Here the business emanates from one particular source—namely, from Paris and from no other. As Lord Macnaghten said in *Inland Revenue Commissioners* v. *Muller & Co.'s Margarine* (2), the goodwill of a business is one whole. It may not be split up into several component parts. In that case, as here, there was only one seat of business. The test to be applied is, has the trade mark the same significance in the hands of the assignee as it had in the hands of the assignor? Another test is, was the label, after assignment, distinctive of the business which Famel was carrying on? The plaintiffs became the true successors of Wilcox & Co. as importers and merchants and not the successors of the assignor. It was not, bona fide, an assignment of the goodwill. It was a stepping-stone to enable the plaintiffs, described

(1) 8 R. P. C. 194, 195. (2) [1901] A. C. 217, 224.

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as merchants, to obtain their registration as proprietors of the 1907 mark: they did not become proprietors of the business. The facts in the *Tarantella* case (1) are distinguishable; there, there was a joint adventure between two companies, one in Italy and the other in England, and the goodwill existed by virtue and as a result of their combined contribution towards carrying on the business. There cannot be an assignment of a trade mark in gross. A mark can only be assigned in connection with the goodwill of the business concerned in the goods; that is, in this case, the manufacturer's business: *Bowden Wire, Ld.* v. *Bowden Brake Co.* (2) There cannot be two separate goodwills, one of the manufacturing business and the other of the selling business, under the same mark. Here the plaintiffs have never manufactured, and their label states that the article is made by Famel. If the goodwill of the manufacturing business was assigned so as to comply with s. 22, it has never been carried on in England and was determined, and the trade mark was determinable therewith. The goodwill purported to be assigned to the plaintiffs was that which was connected with the business of distributing the preparation in Great Britain: there was no assignment in fact of the manufacturing business. As importers of the French preparation they cannot be proprietors of Famel's trade mark, notwithstanding that they have the exclusive right to sell in this country and that Famel, as the manufacturer, has purported to assign to them his trade mark. The plaintiffs had no right, as importers merely, to appropriate to themselves a mark, so as to lead the public to believe that they are the producers of the preparation: *In re Apollinaris Company's Trade Marks.* (3) Both the marks are deceptive: the second mark in that it leads the public to think that the plaintiffs are the manufacturers, and both must be expunged from the register: *Oldham* v. *James.* (4)

Moritz K.C. in reply. The plaintiffs have been on the register as proprietors more than seven years; that fact is

(1) 27 R. P. C. 573.
(2) (1914) 31 R. P. C. 385, 392, 394, 395.
(3) [1891] 2 Ch. 186.
(4) (1863) 14 Ir. Ch. Rep. 81.

prima facie evidence of the validity of the assignment to them: s. 40 of Trade Marks Act, 1905. The plaintiffs had the goodwill of the business of selling in this country the article which was manufactured abroad and they were the proprietors of the mark in this country in respect of that article: *Benjamin Brooke & Co.* v. *Inland Revenue Commissioners* (1); Kerly on Trade Marks, 5th ed., p. 415. The defendant may not sell under the plaintiffs' label: he had only a qualified licence to sell and the plaintiffs are entitled to stop any sub-purchaser with notice of the prohibition against importing the article into and selling it in this country: *National Phonograph Co. of Australia* v. *Menck* (2); *Columbia Graphophone Co.* v. *Thoms.* (3) In that case the defendant, who sold a patented article below the price fixed by the patentee with notice of the restriction, was restrained by injunction. The same principle is applicable to the case of a trade mark, and to the sale in this case of the preparation to a sub-purchaser. The Trade Marks Act, 1905, contemplated a severance of the goodwill, so as to authorize a severance of the goodwill occupationally. In the *Tarantella* case (4) the goodwill was severable, and, as in that case the English trader could be registered for wines produced by the Italian, so here the plaintiffs were entitled to be registered in respect of a French mark. The Court has recognized the severability of the goodwill, and therefore the mark may signify either the source of the article or the hands through which it passes: *Robinson* v. *Finlay.* (5)

Cur. adv. vult.

March 16. CLAUSON J. delivered the following considered judgment: In this action the plaintiffs seek to restrain the infringement by the defendant of two registered trade marks, each registered in the name of the plaintiffs and consisting of a label, the second being in substance an English translation of the first, which is in the French language.

(1) [1896] 2 Q. B. 356, 359.
(2) (1911) 28 R. P. C. 229.
(3) (1924) 41 R. P. C. 294.
(4) 27 R. P. C. 573.
(5) 9 Ch. D. 487.

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There is no question but that the defendant is selling in this country a certain pharmaceutical preparation not emanating from the plaintiffs, on which appears a label almost exactly the same as the first of the two registered trade marks and, to any one acquainted with the French tongue, almost exactly the same as the second registered trade mark, save that it is in French and not in English. So far the action is undefended. The defendant has, however, a motion to rectify the register by removing therefrom the two trade marks in question. If I am in the defendant's favour on his motion the marks must go and the action fails: if I am against him, he necessarily fails in the action. The question before me is, therefore, whether the two marks are properly on the register.

The matter can be further simplified. The second mark is "associated" with the first mark. It is admitted that, if the first mark is to be struck off the register, the second must follow its fate. Accordingly, all that I have to consider is whether the first mark is properly on the register as the plaintiffs' mark. [His Lordship then stated the facts as they occurred before the formation of the company, and in considering the rights of Famel to prevent the sale of "Sirop Famel" in England by others than Famel's own agents after the warning which appeared upon the bottles forbidding their resale, said as follows:] Such a warning might possibly be enforced in England as importing a contract against an immediate purchaser from Famel who resold in England a bottle thus purchased in France; but it is admitted that it could not be enforced by way of contract against a purchaser from such a purchaser: *McGruther* v. *Pitcher*. (1) It was suggested before me that while Famel remained the registered owner of the 1907 mark, he might have enforced in an English Court this embargo on export to England by virtue not of a contract but of his rights as owner of the mark. It was, I think, admitted that the very weighty statement of the law on this topic by Fry L.J. delivering the considered judgment of the Court of Appeal, consisting of Lindley and Bowen L.JJ.

(1) [1904] 2 Ch. 306.

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and himself, in *In re Apollinaris Company's Trade Marks* (1), is to the exact contrary ; but it was suggested that the statement in question was a mere dictum, and that it would have to be reconsidered in view of the decision of the Privy Council in regard to patented articles in *National Phonograph Co. of Australia* v. *Menck* (2), a decision which, it was suggested, furnished an analogy between the case of a patentee (who has an absolute right to prevent user of the patented article) and the case of the owner of a trade mark whose right is merely to restrain the use of a deceptive label. The unauthorized seller in England is, in the case supposed, selling the real article of the real maker under the maker's own label and no element of deceptiveness exists. However, I need not pursue this topic, for Famel did not attempt, while the registered owner of the 1907 mark, to enforce any such right, if it existed, against unauthorized importers of his preparation into England. [His Lordship then referred to the formation of the plaintiff company and the facts subsequent thereto, in the course of which he observed that, as matters stood at the date of the appointment by Famel of the plaintiffs as sole agents for the sale of " Sirop Famel " in England, the plaintiffs could not sue for any infringement of the 1907 mark, notwithstanding their position as sole wholesale agents : *Richards* v. *Butcher* (3) : and continued :] The plaintiffs admittedly have never made the article either in England or in France. It is said that negotiations have been on foot which may result in a change in this state of affairs. No such change has, however, yet taken place. In these circumstances, are the plaintiffs the properly registered owners of the 1907 mark ? Apart from statute it has been established since the decision in *Leather Cloth Co.* v. *American Leather Cloth Co.* (4) that a purchaser of a mark becomes owner of it only if he becomes at the same time purchaser of the manufactory or (to put it rather more widely in view of modern developments) the business concerned in the goods to which the mark has been affixed ;

(1) [1891] 2 Ch. 186, 234.
(2) 28 R. P. C. 229.
(3) 7 R. P. C. 288.
(4) 11 H. L. C. 523.

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and the first clause of s. 22 of the Act of 1905, which reproduces, with immaterial alterations, the corresponding provisions in s. 2 of the Act of 1875 and s. 70 of the Act of 1883, merely embodies this principle in statutory form: see *Pinto* v. *Badman*. (1)

It was, if I understood the argument rightly, suggested on behalf of the plaintiffs that, in view of the presence in the Act of 1905, as amended by the Act of 1919, of the second clause of s. 22 and of s. 23 (provisions which had no place in the statutes before 1905), the principle embodied in the first clause of s. 22, of the inseparability of a mark from the business concerned in the goods for which it has been registered, must be treated as modified. I agree that this is, or may be, so in regard to the particular cases to which the provisions of the second clause of s. 22 or of s. 23 apply, but I am not dealing with a case to which those provisions apply; and I can see no ground for the suggestion that, save as regards cases to which those provisions apply, the principle of inseparability which existed before the Act of 1875, and is enacted by succeeding Acts ending with the first clause of s. 22 of the Act of 1905, is in any way different now from what it was in 1865 when the House of Lords dealt with the *Leather Cloth Co.'s* case. (2)

The question then for me to consider is whether, when the 1907 mark was assigned to the plaintiffs, they became, at the same time, owners of the business concerned in "Sirop Famel," that is to say, of Famel's business concerned in "Sirop Famel"; for, admittedly, there was no other business so concerned but Famel's business. Turning to the assignment of June 28, 1924, I find that what is assigned is "the goodwill of the business concerned in the goods with respect to which the trade mark is registered." If I am to read those words according to their strict tenor the whole of Famel's business was assigned, including, of course, the manufacturing business, and the plaintiffs are Famel's complete successors in his business of producing and vending "Sirop Famel." Now it is plain from the facts I have stated

(1) 8 R. P. C. 181. (2) 11 H. L. C. 523.

that the parties cannot have meant this result to ensue; for, since the assignment, as before it, the plaintiffs have had nothing to do with Famel's business in France; they have been mere importers into and sellers in this country. If, notwithstanding the intention of the parties, the plaintiffs have, in law, become owners of Famel's whole business, it may well be that, as they have allowed Famel, nevertheless, to continue to carry on the French business as before, they must be treated, in law, as having abandoned the French part of the business so assigned to them, and brought it to an end, permitting Famel, notwithstanding the assignment, to carry on a French business exactly corresponding to the French business theretofore carried on by him. The result would be that the business assigned to the plaintiffs must be treated as determined, with the result that, under s. 22, the 1907 mark has determined with it. But counsel for the plaintiffs did not claim that the plaintiffs were assignees of Famel's whole business; they argued that the English assignment could deal only with the British part of the business (an argument which, as a matter of law, I find it difficult to accept) and, at all events, that the assignment must be treated as being what, obviously, all parties must have intended it to be, namely, an assignment of the British portion of Famel's business, namely, the business of importing the preparation into Great Britain and selling it there. I am content so to take it. But what follows? Unless it can be said that s. 22 enabled a mark, which is used for goods in which Famel's business of manufacturing in France and vending in France and England is concerned, to be effectually assigned, not with that business but with one department only of that business, the mark has never become the assignees' mark and cannot be registered in their names. The first clause of s. 22 (the only statutory provision which it is necessary for me to consider) does not, in my judgment, enable a mark distinctive of goods emanating from Famel's business (composed of manufacturing and vending departments) to be assigned with a portion of the business—namely, that of vending in Great Britain, that portion being separated

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from the rest of the business. If it were not so, the result would be that a mark distinctive of goods produced and sold in the business carried on by Famel would become by the assignment distinctive, not of goods produced and sold in that business by Famel, or his successors, but of goods sold in a newly separated and, therefore, different business by persons who succeeded Famel as vendors in Great Britain of the goods, but not as producers of them. Such a position seems to me to be inconsistent with the principle that a trade mark is distinctive of goods with which a particular business (whether carried on by the original trader or his successors) is concerned. If the identity of the business is destroyed the mark is destroyed with it.

Accordingly, the plaintiffs' contention that the assignment was effectual to transfer the 1907 mark to them seems to me to fail, because the mark was not assigned in connection with the goodwill of the business (namely, Famel's producing and vending business) concerned in "Sirop Famel," within the meaning of the Act of 1905. The mark could only be assigned to Famel's successors in the business to which the mark belonged. The plaintiffs were not intended to succeed, and did not succeed, to the business to which the mark belonged.

While I have reached this conclusion on the construction of s. 22 there is, I venture to think, corroboration of my view of the law to be found in another passage in the judgment of Fry L.J. in *In re Apollinaris Company's Trade Marks.* (1) Fry L.J. says: "The mark of a manufacturer pure and simple cannot rightly be assumed by an importer from that manufacturer, or by a person who buys from that manufacturer, unless indeed where all the goods of the manufacturer go to that importer or that dealer. If they did not, other goods of the manufacturer might reach the hands of other dealers, who might justly affix to them the manufacturer's mark. Now for this purpose the owner of a natural source of an article which nature manufactures is in the same position as a manufacturer by the hands of

(1) [1891] 2 Ch. 186, 226.

his workpeople. If Saxlehner's assent would justify the registration, it would follow that a manufacturer in Paris using a trade mark well known in England could allow A. to register it as his trade mark, and thereby prevent B. and C., who bought from the Paris maker, from selling in England." Applying that language to the present case, I am entitled to say that Famel, a manufacturer in Paris, using a label exactly similar to the 1907 mark, cannot allow the plaintiffs to register the 1907 mark and thereby succeed in preventing the defendant, who has bought ultimately from Famel, selling the preparation under Famel's mark in England. Can Famel produce the desired result by assigning the label to the plaintiffs coupled with the goodwill of the part of his business which is concerned with exporting the preparation into and selling it in England? It would be strange if he could; and this seems to support my view that, on the true construction of s. 22, he cannot.

Basing my judgment on the reasons I have set out above, it is not necessary that I should rely on any other ground; but it is to be observed that the sale by the defendant in England of "Sirop Famel" under the 1907 mark was not deceptive before Famel assigned the 1907 mark to the plaintiffs. Mere assignment of the mark by Famel to the plaintiffs cannot make that deceptive in the future which was not deceptive in the past. If there is no deceptiveness how can the plaintiffs have the rights they claim? The explanation must be that the 1907 mark is not distinctive of the plaintiffs' goods, or of the plaintiffs' business, and that the deceptiveness is not in the use of the mark by the defendant on Famel's goods, but in the use of the mark by the plaintiffs to distinguish exclusively such goods of Famel's as pass through their hands: see on a somewhat similar point *In re Warschauer's Mark.* (1) It would seem to be reasonable and it is, in my judgment, the law that a mark ceases to be a good mark if, owing to the action of the registered owner, it becomes deceptive: see *In re Hotpoint Electric Heating Co.* (2) I do not see why a mark should not cease to be a

(1) (1925) 43 R. P. C. 46. (2) (1921) 38 R. P. C. 63.

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good mark if it is assigned in such a way as to enable the transferee to use it, so as to represent something other than that which the mark represented in the hands of the transferor: see *Pinto* v. *Badman*. (1)

For the reasons I have given the action must be dismissed, and the register must be rectified by expunging both the 1907 and the 1925 marks. The plaintiffs must pay the costs of the action and of the motion for rectification.

Solicitors: *Taylor, Willcocks & Co.; Butcher & Simon Burns.*

H. C. H.

ROMER J. 1927 *April* 5, 6, 7.

In re JAMES BURTON AND SON, LIMITED.

[00380 of 1925.]

Company—Shares—Allotment before filing Statement in lieu of Prospectus—Void—Transfer of Shares after filing—Transferee presented Transfer, accepted Certificate and a Bonus and attended Meeting of Shareholders—Transferee held Member of Company—Companies (Consolidation) Act, 1908 (8 *Edw.* 7, *c.* 69), *s.* 82, *sub-s.* 1.

Sect. 82, sub-s. 1, of the Companies (Consolidation) Act, 1908, provides that a company which does not issue a prospectus shall not allot any of its shares or debentures, unless before the first allotment there has been filed a statement in lieu of prospectus.

In January, 1920, K. applied, on a form supplied to him by Y., for 100 shares in a company about to be formed. On April 14, Y. purported to transfer to K. 100 shares, but the transfer did not specify the denoting numbers of the shares comprised therein. At a meeting of the directors held on April 16, a resolution was passed purporting to allot all the shares of the company. At that date the company had not issued a prospectus or filed a statement in lieu thereof. On April 20 the statement in lieu of prospectus was filed. At a meeting of the directors held on April 30 the transfer from Y. to K. came before the board, and a resolution was passed approving the transfer and directing that a share certificate should be forwarded to K. Subsequently K. was registered a member of the company. The certificate, dated May 26, was sent to and was accepted by K. On June 8 a bonus, declared at the meeting of April 30, was paid to and was accepted by K. K., as purporting to be the owner of the 100 shares, attended a meeting of shareholders on March 24, 1921. Subsequently the company went into liquidation. K., on whose shares

(1) 8 R. P. C. 181.

there was a liability of 10*s.* per share, then denied being a shareholder, contending that the allotment of shares to Y. was void under s. 82, sub-s. 1:—

Held, that although the allotment to Y. was void, K. was a member of the company at the commencement of the winding up, there having been no agreement between him and the company until April 30, when the company was legally in a position to allot shares, and that in any event, in view of his subsequent conduct, he was estopped from denying that he was a member of the company.

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THIS was an application for an order that the register of shareholders of the company should be rectified by removing the name of the applicant in respect of 100 shares registered in his name, and that the list of contributories of the company and the liquidator's certificate finally settling the same might be varied by excluding the name of the applicant therefrom.

The company was formed by Mr. Young and Mr. Heywood, and was incorporated on April 9, 1920, with a capital of 600,000*l.*, divided into 1*l.* shares. Young and Heywood formed the company in order that it might take over from them certain cotton mills which they had purchased on June 19, 1919, for a sum of 400,000*l.*, and which they proposed reselling to the company for the sum of 550,000*l.* On January 20, 1920, a circular was sent to the applicant (amongst others) on behalf of Young and Heywood, stating that they proposed to form a new company, and that it was hoped the company would be incorporated very shortly, and it continued: "The capital of the proposed company will be 600,000*l.*, divided into 600,000 shares of 1*l.* each, upon which 10*s.* per share will be called up. The shares in the new company may be acquired at par, i.e., 10*s.* per share of 1*l.* (10*s.* paid up). If you desire to acquire shares, an application form should be completed and forwarded to us or the Union Bank of Manchester. . . . . Application should be made not later than Wednesday, February 4, 1920." A form of application for shares was attached to the circular. The applicant filled in the form, applying for 100 shares, and enclosed a cheque for 50*l.* At a meeting of the directors held on April 16, 1920, a resolution was passed that the shares in the company should be allotted in accordance with the applications received

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to the persons named thereunder. The persons named thereunder were Young, Heywood, the solicitor to the company (4000 shares each), the four signatories to the memorandum of association (one share each), and Young (587,996 shares, the balance of the share capital). On April 14, 1920, Young purported to transfer to the applicant 100 shares, but the transfer did not specify the denoting numbers of the shares comprised therein. On April 20, 1920, the statement in lieu of prospectus was filed. On April 30 there was a meeting of directors. At that meeting the transfer of the 100 shares from Young to the applicant came before the board, and a resolution was passed approving the transfer and directing that a share certificate should be forwarded to the applicant. Subsequently the applicant was registered a member of the company. The certificate, dated May 26, was sent to and was accepted by the applicant. At the board meeting of April 30 a bonus of 6*d.* per share was declared, and that bonus was paid to and accepted by the applicant on June 8. The applicant, as purporting to be the owner of the 100 shares, attended the first meeting of shareholders on March 24, 1921. Subsequently the company went into liquidation. The applicant then denied being a shareholder, contending that on April 16, s. 82, sub-s. 1, of the Companies (Consolidation) Act, 1908, had not been complied with, and that therefore the allotment of shares to Young was void.

Gover K.C. and *J. Bennett* for the applicant. This application is made under s. 32 of the Companies (Consolidation) Act, 1908. The allotment of shares on April 16, 1920, was void under s. 82, the company not having filed a statement in lieu of prospectus until April 20. The holder of such shares cannot be said to be a member of the company. It is said that the applicant is estopped from denying that he is a member of the company by reason of his : (1.) taking a transfer and accepting a certificate ; (2.) accepting a bonus dividend ; (3.) attending a meeting of shareholders. The question is, how far can s. 82 be advanced against a case of estoppel ? The allotment was wholly void and illegal. Such

an allotment is prohibited by the statute on the ground of public policy, and the Court will not aid the company or the liquidator in any way. The allotment being illegal and prohibited, there can be no liability on the applicant by reason of estoppel or acquiescence. In some sections of the Act of 1908 there are provisions requiring something to be done, with a sanction in each case for breach: see s. 30. In other sections there are provisions requiring something not to be done, with express sanction for breach annexed, as in s. 85. In ss. 1 and 82 there are prohibitions without any sanctions attached at all. The point is dealt with by Warrington J. and by Swinfen Eady L.J. in *In re Blair Open Hearth Furnace Co.* (1) Astbury J. in *In re Jubilee Cotton Mills, Ld.* (2) did not decide it, but the Court of Appeal (3), reversing the decision of Astbury J., held that the allotment was illegal and void. The House of Lords (4) reversed the judgment of the Court of Appeal, but not on this point. The allotment of April 16 being void, the allottees received nothing from the company, and the company could enforce no obligations on them or their transferees. The transaction of April 30 did not amount to an agreement by this applicant to become a member of the company within s. 24 of the Act of 1908. He requested the company to pass a transfer by Young, and to put his (the applicant's) name on the register, and nothing more. He, in fact, got nothing from Young. To bring him within s. 24, it would be necessary to go further. It does not matter what he did subsequently. Assuming that the allotment was void, the doctrine of estoppel does not come in at all.

[They also cited *Whiteman* v. *Sadler* (5); *Melliss* v. *Shirley Local Board* (6); and *In re Robinson's Settlement.* (7)]

Luxmoore K.C. and *Robert Peel* for the official receiver were not called upon.

ROMER J. I do not think I need trouble you, Mr. Luxmoore.

(1) [1914] 1 Ch. 390, 399, 407.
(2) [1922] 1 Ch. 100.
(3) [1923] 1 Ch. 1.
(4) [1924] A. C. 958.
(5) [1910] A. C. 514.
(6) (1885) 16 Q. B. D. 446.
(7) [1912] 1 Ch. 717.

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I have listened with very great care and interest to Mr. Gover's argument, but I confess it appears to me that this application must fail. It is an application by a Mr. Kenworthy who, at the commencement of the winding up, was on the register of shareholders of the company in respect of 100 shares on which only 10*s.* per share had been paid, asking that the register of the shareholders may be rectified by removing his name in respect of those shares, and that the list of contributories of the company, and the liquidator's certificate finally settling the same, may be varied by excluding the name of the applicant therefrom.

Kenworthy's case is this. He says: "True it is that I am on the register of shareholders, but I never made any agreement with the company to become a member, and therefore I am not a member within the definition of 'members' contained in s. 24 of the Companies (Consolidation) Act, 1908. What in fact happened was that Young purported to agree with the company to become a member in respect of 100 shares, and that he subsequently purported to transfer those shares to me; I have been registered in respect of those shares, but the agreement between Young and the company was an illegal agreement having regard to s. 82 of the Companies (Consolidation) Act; it was a mere nullity, and therefore the transfer to me and the subsequent registration of me as transferee are also mere nullities. No agreement has ever been come to between me and the company, and my name ought to come off the register."

The effect of an allotment made in contravention of s. 82, sub-s. 1, has been considered by the Court of Appeal and the House of Lords. The Court of Appeal first of all had to consider it in *In re Blair Open Hearth Furnace Co.* (1) The case itself, as it turned out, did not demand an actual decision upon the effect of an allotment in defiance of s. 82, sub-s. 1, but in the judgments of the members of the Court of Appeal there are expressions of their opinion, though such expressions are, in the circumstances, merely obiter.

(1) [1914] 1 Ch. 390.

Cozens-Hardy M.R., after referring to s. 82, sub-s. 1, says this (1): "Now it has been argued before us that the imposition by Parliament of this obligation upon the company really amounts to this, that there can be no contract, and therefore no allotment which is the completion of an offer made, unless and until the statement has been filed, and that means not merely a statement in the form of a statement answering the questions, but a statement which is substantially true and complete. If that be the right view, then this appeal will succeed, but I am not prepared to take that view." He was not prepared to take the view that the section meant that not only must there be a statement filed in lieu of prospectus, but that the statements in that statement must be accurate. He does however point out in this passage, that the section means there can be no contract, and therefore no allotment which is the completion of an offer made, unless and until the statement has been filed. That was his view. It was also the view of Swinfen Eady L.J., who said (2): "In my judgment the effect of this statutory provision that a company shall not do a certain thing—that is in this particular case shall not enter into a contract, because the allotment following the application constitutes a contract to take the shares—this prohibition that the company shall not enter into the contract completely prohibits and prevents the company from legally entering into a contract." He further says (3): "I am of opinion that if no statement had been filed the allotment would have been invalid." Then Phillimore L.J. says (4): "I accept the argument of the appellants that the effect of s. 82 is to make an allotment of shares or debentures by a company which is not a private company, and which does not issue a prospectus and does not file a statement in lieu of prospectus, not voidable but void."

In *In re Jubilee Cotton Mills, Ld.* (5), it was contended again that an allotment in contravention of the section was

(1) [1914] 1 Ch. 390, 403.
(2) [1914] 1 Ch. 390, 408.
(3) [1914] 1 Ch. 409.
(4) [1914] 1 Ch. 412.
(5) [1922] 1 Ch. 100; [1923] 1 Ch. 1.

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not merely voidable, but was void; illegal for all purposes. It was not necessary to decide that point in the Court of first instance, but in the view that the Court of Appeal took of the case it became necessary for them actively to decide it. As I read the judgment of the Court of Appeal in *In re Jubilee Cotton Mills, Ld.* (1), they were of opinion, and decided, in accordance with the dicta in *In re Blair Open Hearth Furnace Co.* (2), that an allotment in contravention of s. 82 is void for all purposes, not merely voidable. The *Jubilee Cotton Mills* case (1) went to the House of Lords (3), and the decision of the Court of Appeal was reversed, but in the view the House of Lords took it was not necessary to decide the actual point as to the effect of s. 82. Certainly one of the learned Lords, Lord Sumner, expressed the view—there were others expressed a different view—that the section did not make the allotment absolutely void, but at most voidable. I think that is the effect of what Lord Sumner said.

In those circumstances, so far as this Court is concerned it is bound to treat an allotment made in contravention of s. 82 as illegal and void. I propose so to treat it. But what does that mean? It means no more than this. That no contract was come to between Young and the company on April 16, under which the company became bound to register Young, and Young became bound to take these shares in the company. The contract was not completed because this allotment, which it is pointed out by the Court of Appeal was a mere acceptance of the offer to take the shares communicated to the applicant, was in the circumstances ultra vires the company.

The position on April 16 was this. The company had before it an application by Young for the balance of the shares, and applications by all the people who, like Kenworthy, had signed applications. None of those applications having been withdrawn, they were continuing offers both by Young and by those applicants to take shares in the company.

(1) [1922] 1 Ch. 100; [1923] 1 Ch. 1. (2) [1914] 1 Ch. 390.
(3) [1924] A. C. 958.

Another thing took place which I ought to have mentioned before dealing with the allotment of shares on April 16. On April 14 Young had purported to transfer to Kenworthy, and presumably he had also purported to transfer in the same way to other applicants, the number of shares for which the applicants—Kenworthy and the other applicants—had signed application forms, and which he had said that he was reserving for them and would transfer to them. But the transfer does not refer to any shares by any particular number, nor could it have done, because the company had not even purported to allot any shares to Young at that time.

So that the position after April 16, in spite of the allotment or purported allotment of shares to Young, was as I have stated it just now, but with this addition, that Young had purported to transfer to the various applicants the numbers of shares for which they had signed applications.

On April 20, 1920, the statement in lieu of prospectus was filed, and after that date the company could validly and properly allot to these applicants, or to Young, the shares for which they had applied to the company.

On April 30 there was a meeting of the directors at which again both Young and Heywood were present. At that meeting certain of the transfers which had been signed by Young, including the transfer which he had signed purporting to transfer 100 shares to Kenworthy, came up before the board. Thereupon the board passed a resolution approving these transfers, and directing that share certificates should be forwarded to the transferees. So that this transfer of 100 shares in favour of Kenworthy was approved by the company, and the share certificate was to be forwarded to him. Then on some day thereafter Kenworthy's name was entered in the share register as being the transferee from Young of shares bearing particular numbers.

The certificate is in the usual form. It certifies that Kenworthy is the registered proprietor of 100 shares of 1*l.* each, and the numbers referred to are in the margin of the certificate.

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On June 8, 1920, there was a bonus paid to Kenworthy, and accepted by him, which had been declared at the board meeting on April 30, and Kenworthy, as purporting to be the owner of these shares, attended the first meeting of shareholders on March 24, 1921. The company has now gone into liquidation, and Kenworthy and others, who stand in a similar position, say in these circumstances they are not shareholders.

It is a somewhat astonishing position. In my opinion it is a position which cannot validly be taken up. It appears to me that when on April 30 the company, which was then in a position to allot shares directly to Kenworthy or to Young, or to anybody else who had made application, accepted the transfer and registered Kenworthy in respect of the shares, an agreement was come to between Kenworthy and the company by virtue of which he became a member in respect of those shares. What was the legal position at that time? No contract with Young, no contract with Kenworthy, but a document presented to the company by which Young purported to transfer to Kenworthy 100 shares. Now what would that mean? It would mean surely this. "I, Young, have applied for 591,996 shares; of those shares for which I have applied, I wish you to allot 100 to Kenworthy." That is what the transfer must mean inasmuch as Young was not properly registered and could not have been properly registered on April 16 in respect of the shares in question. It seems to me that the position in law is no more than this. A man has made an application for shares in a company; before allotment somebody produces to the company a transfer, or what purports to be a transfer, by the applicant of certain of the shares for which he has applied. Surely that being presented by the transferee to the company must be taken as a request by him to the company to allot the shares to him. That is what the company has in fact done, because the previous allotment was an invalid allotment, and when they entered him on the register in respect of these shares it seems to me that they accepted the offer of Kenworthy to take these 100 shares.

For these reasons it appears to me that s. 82 does not in any way enable Kenworthy to relieve himself of this liability which he always intended to undertake.

Further than that, supposing that so far I have been wrong, and that in fact and in law there was no agreement come to between the company and Kenworthy constituting Kenworthy a member, then Kenworthy appears to me to be estopped, by what he has been doing, from denying that any such agreement had been come to. It is true that Kenworthy may not be estopped from alleging that the allotment to Young was illegal and void. I will assume that; but that is no reason why he should not be estopped from denying that a valid agreement was come to between him and the company for the allotment to him of these 100 shares. He was placed on the register in respect of these shares, and he received a certificate. He did not get a certificate from Young as a matter of fact, but he received the certificate from the company. He acted as a shareholder of the company, and he received a bonus on his shares. In these circumstances I should have thought he was clearly estopped from denying that an agreement was come to between him and the company, under which he agreed to take those shares at a time when the company was in the position legally to enter into such an agreement.

In my opinion this application fails, and must be dismissed.

Solicitors: *Hall, Hawkins, Pimblott, Brydon & Chapman; Simmons & Simmons.*

P. J. B.

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March 23, 24; *April* 13.

PURNELL *v.* ROCHE.

[1926. P. 1797.]

Mortgage—Foreclosure Action—Disability of Mortgagee—Unsound Mind—Date of Accruer of Right to bring Action—Real Property Limitation Act, 1833 (3 & 4 *Will.* 4, *c.* 27), *ss.* 3, 14; *Real Property Limitation Act*, 1837 (1 *Vict. c.* 28); *Real Property Limitation Act*, 1874 (37 & 38 *Vict. c.* 57), *ss.* 1, 3, 9.

In 1902 certain freehold hereditaments were assured to a mortgagee. In February, 1907, the mortgagee became, and thenceforward continued to be, of unsound mind. The last payment in respect of interest before the date on which the mortgagee became of unsound mind was made on January 30, 1907. In March, 1907, the husband of the mortgagee accepted, on behalf of the mortgagee, a further payment on account of interest. Since that payment no further payment of interest was made. In 1926 a summons for foreclosure was issued by the mortgagee, and it was claimed on her behalf that her rights under the mortgage were preserved by s. 3 of the Real Property Limitation Act, 1874:—

Held, that the right to commence proceedings first accrued, at the latest, at the date fixed for the redemption of the mortgage, which was a date earlier than that on which the mortgagee became of unsound mind; and that the foreclosure proceedings must be dismissed, inasmuch as, in view of the express words of the Real Property Limitation Act, 1837, a disability beginning after the date when the right to bring the action first accrued, or must be deemed to have first accrued, would not entitle the mortgagee to the protection given by s. 3 of the Act of 1874.

SUMMONS.

By an indenture of mortgage dated September 27, 1902, one James Roche assured to the plaintiff certain freehold hereditaments at Cheltenham by way of mortgage for securing payment to the plaintiff of the principal sum of 350*l.* and interest as therein mentioned subject to redemption on payment on March 27, 1903. Since the date of the mortgage James Roche and those claiming under him remained in undisturbed occupation of the premises. On February 23, 1907, the plaintiff became and afterwards continued to be of unsound mind, but no receiver of her estate was appointed until January 28, 1926, when her husband Robert John Purnell was appointed receiver. The last payment in respect of interest before the date on which the plaintiff became of unsound mind was made on January 31, 1907,

when the mortgagor paid to the plaintiff's husband, who received the same as her agent, the sum of 17*l.* 10*s.* in respect of interest for the year ending September 27, 1906. On May 25, 1907, the mortgagor made a payment to the husband on account of interest due on March 27, 1907, but since that payment no interest was paid under the mortgage and there was no evidence of any acknowledgment in writing of the plaintiff's title having been given by the mortgagor since the date of the mortgage.

In 1926 a summons was issued by the mortgagee for the enforcement of the mortgage by foreclosure or sale.

Owen Thompson K.C. and *Jolly* for the plaintiff. The payment made on May 25, 1907, after the mortgagee became of unsound mind, enures for the benefit of the mortgagee. Time did not begin to run until the date of that payment, which was the last payment made: Darby & Bosanquet on the Statutes of Limitations, 2nd ed., p. 394; *Owen* v. *De Beauvoir*. (1) It is true that in the case of a mortgage the right to bring an action first accrues at the date fixed for redemption, and if on demand at the date of the demand. The statute of 1837, however, which was enacted for the purpose of explaining the Real Property Limitation Act, 1833, so far as that Act related to mortgages, gives a new starting point for all purposes. As a result of the Act of 1837 the right accrues in the present case as from the date of the last payment of interest. Sect. 14 of the Act of 1833 only carries out the scheme in respect of acknowledgments. The Act of 1837, which did not deal with acknowledgments, removes the doubt as to the difference of the wording in ss. 14 and 16 of the Act of 1833. In s. 5 of the Civil Procedure Act, 1833 (3 & 4 Will. 4, c. 42), acknowledgment in writing and acknowledgment by payment of interest are for the purposes of that statute treated as one. It would be extraordinary if s. 16 of the Act of 1833 (re-enacted by s. 3 of the Act of 1874) were to be construed so as to be directly in conflict with s. 14 and with s. 5 of the Civil Procedure Act, 1833. The language used is not such as to compel the Court

(1) (1847) 16 M. & W. 547, 567; 5 Ex. 166.

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to hold that the date of the last payment of interest is not the date at which the right accrues.

[They also referred to *Harlock* v. *Ashberry* (1); *Sutton* v. *Sutton* (2); *In re Lacey* (3); *Doe* v. *Williams* (4); *Thornton* v. *France* (5); *Heath* v. *Pugh* (6); and *Chinnery* v. *Evans* (7); and Carson's Real Property Statutes, 3rd ed., p. 201.]

G. O. Slade (*Earengey* with him) for the defendants. The words of the statute are unambiguous, and it is therefore not permissible to refer to other statutes in order to construe them. Sect. 3 of the Act of 1833 formulates a number of rules for ascertaining the first accrual of rights of action. Here the right first accrues at the end of six months after the date of the mortgage. The "doubts," which the Act of 1837 was enacted for the purpose of clearing up, are discussed in Lightwood on the Time Limit of Actions at pp. 85 and 86; see also Darby & Bosanquet on the Statutes of Limitation, 2nd ed., p. 396. The expression "shall have accrued" is quite distinct from the expression "shall be deemed to have accrued." The actual first accrual is anterior to the last of the payments. The first accrual of the right can happen only once and not fifty times. The right may be "deemed" to accrue fifty times: *Wakefield and Barnsley Union Bank* v. *Yates*. (8) With regard to the payment of interest on May 25, 1907, there was no agency. The husband had no authority to receive the money, and that payment must therefore be disregarded.

Owen Thompson K.C. in reply.

April 13. ROMER J. This is a summons by a mortgagee to enforce a mortgage by foreclosure or sale. The question that I have to determine is whether or not the plaintiff's rights are barred by the Real Property Limitation Acts. [His Lordship stated the facts and continued:] In these circumstances the defendants, claiming through the mortgagor, who died on August 31, 1923, contend that the plaintiff's rights have been barred by virtue of the Real

(1) (1882) 19 Ch. D. 539.
(2) (1882) 22 Ch. D. 511.
(3) [1907] 1 Ch. 330, 345.
(4) (1836) 5 Ad. & E. 291.
(5) [1897] 2 Q. B. 143, 156.
(6) (1881) 6 Q. B. D. 345.
(7) (1864) 11 H. L. C. 115.
(8) [1916] 1 Ch. 452.

Property Limitation Acts, more than twelve years having elapsed since the date of the last payment of interest, whether that date be taken as January 31, 1907, or May 25, 1907. It is, on the other hand, contended on behalf of the plaintiff that, having regard to the fact that at the last mentioned date she was and still is of unsound mind, her rights under the mortgage have been preserved by virtue of s. 3 of the Real Property Limitation Act, 1874. That section, so far as material, is as follows: "If at the time at which the right of any person to make an entry or distress, or to bring an action or suit, to recover any land . . . . shall have first accrued as aforesaid such person shall have been under" [the disability of] "unsoundness of mind, then such person . . . . may, notwithstanding the period of twelve years, ... hereinbefore limited shall have expired, make an entry . . . . or bring an action or suit, to recover such land . . . . at any time within six years next after the time at which the person to whom such right shall first have accrued shall have ceased to be under any such disability."

The plaintiff alleges that having regard to the Real Property Limitation Act of 1837, her right to bring this action for foreclosure, which is "an action to recover land" within the meaning of the statutes, must be deemed, for the purposes of s. 3 of the Act of 1874, to have first accrued on May 25, 1907. The defendants, on the other hand, contend that the payment of interest on May 25, 1907, was not such a payment of interest as is mentioned in the Act of 1837, inasmuch as Robert John Purnell had no authority to receive the money on behalf of his wife, and that such payment must, for the present purposes, be treated as a nullity.

The defendants further contend that even if such payment was a payment of interest secured by the mortgage within the meaning of the Act of 1837, yet the plaintiff's right to make her entry or bring her action first accrued either at the date of the mortgage or, at latest, at the date (March 27, 1903) when the estate of the mortgagee became absolute at law.

This second contention of the defendants raises a question

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of some difficulty which has never been the subject of judicial decision.

After giving the matter the best consideration I can, I have come to the conclusion that the defendants are right in this second contention. It is unnecessary therefore to consider whether or not the payment on May 25, 1907, was a payment of interest of which the plaintiff could have availed herself for the purposes of the statute of 1837. My reasons for coming to that conclusion are as follows :—

By s. 1 of the Act of 1874, which replaces s. 2 of the Act of 1833, it is provided (so far as material) that no person shall make an entry or bring an action or suit to recover any land but within twelve years next after the time at which the right to make such entry or to bring such action or suit shall have first accrued to the person making or bringing the same. Then, by s. 3 of the Act of 1833 (which applies equally to the Act of 1874) it is provided that in the construction of the Act the right to make an entry or bring an action shall be deemed to have first accrued at the times therein mentioned. The only times mentioned that are material to the present are the following, which I will designate A and B. A. "When the person claiming such land or rent shall claim in respect of an estate or interest in possession granted, appointed or otherwise assured by any instrument (other than a will) to him, or some person through whom he claims, by a person being in respect of the same estate or interest in the possession or receipt of the profits of the land, or in the receipt of the rent, and no person entitled under such instrument shall have been in such possession or receipt, then such right shall be deemed to have first accrued at the time at which the person claiming as aforesaid, or the person through whom he claims, became entitled to such possession or receipt by virtue of such instrument." B. "When the person claiming such land or rent, or the person through whom he claims, shall have become entitled by reason of any forfeiture or breach of condition, then such right shall be deemed to have first accrued when such forfeiture was incurred or such condition was broken."

Now when the Act of 1833 came into force, considerable doubt was felt as to its effect upon mortgagees of land. For whether their right to make an entry or to bring their action accrued within the meaning of s. 2 of the Act at the date of the mortgage, or was to be deemed to accrue at that date by virtue of provision A in the third section, or whether it was deemed to accrue at the date of the estate of the mortgagee becoming absolute at law by virtue of provision B in that section, the mortgagee's right would at the end of twenty years, and assuming there was no acknowledgment under s. 14, have been barred, even though interest had been regularly paid to him by the mortgagor. For the statute contains no exception to meet the case of payment, and the fact that the possession of the mortgagor was not adverse to the mortgagee was no longer a material consideration. Such doubts were expressed by Patteson J. in the case of *Doe* v. *Williams* (1) both in the course of the argument and in giving judgment. In the course of the argument he said: "If the legislature meant to except the case of payment of interest, it is very odd that they did not do so in express terms," and in the course of his judgment he said: "How far, under the third section, it is necessary for the mortgagee to bring his action within twenty years from the day of default, I cannot say: I do not see my way at all." This last observation must, I think, have been intended to apply exclusively to the case of a mortgagee to whom payments had been made in respect of interest or principal. If no such payment be made for twenty years from the date of the mortgage or the day of default the learned judge could not, I think, have been in doubt that the mortgagee would be barred under ss. 2 and 3 of the Act. Indeed in *Wrixon* v. *Vize* (2) Lord St. Leonards said this: "Now although the conveyance was by way of mortgage, the right to bring an action, or make an entry, clearly falls within the second section. This admits of no doubt and was decided by the case of *Doe* v. *Williams*." (1) A little later in his judgment he continued: "The second section having provided the twenty years as a limitation of time, the third

(1) 5 Ad. & E. 291, 295, 297. (2) (1842) 3 Dr. & War. 104, 116.

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section declares from what period the time shall run in the several cases provided for. The only provision in this section which could apply to mortgages is the last part of it," and he then read the provision B to which I have referred. He then quoted the observation of Patteson J. that if the third section was intended to comprehend the case of a mortgagee it was ill penned. I am not sure whether Lord St. Leonards intended to express any concluded opinion as to whether any part of s. 3 applied to a mortgagee. But if it does not, then, inasmuch as according to him a mortgage is within s. 2, the mortgagor would, in the absence of any payment, be barred at the end of twenty years from the date of the mortgage. For it was laid down by Lord Cairns in *Pugh* v. *Heath* (1) that s. 3 of the Act in defining when the right shall be " deemed to have accrued " is not necessarily exhaustive. Where therefore a mortgagor remains in occupation without payment on account of interest or principal, then in the absence of written acknowledgment of the mortgagee's title, the mortgagee would be barred by the statute of 1834 either after the expiration of twenty years from the execution of the mortgage deed or at the expiration of a like period from the date fixed by the deed for redemption. The doubt was as to what was the effect of a payment of principal or interest within the period. In order to remove this doubt, the Real Property Limitation Act of 1837 was passed. That Act, as amended by s. 9 of the Real Property Limitation Act, 1874, is as follows: " Whereas doubts have been entertained as to the effect of a certain Act of Parliament made in the third and fourth years of his late Majesty King William the Fourth, intituled ' An Act for the limitation of actions and suits relating to real property, and for simplifying the remedies for trying the rights thereto,' so far as the same relates to mortgages; and it is expedient that such doubts should be removed: It shall and may be lawful for any person entitled to or claiming under any mortgage of land, being land within the definition contained in the first section of the said Act, to make an entry or bring an action at law or suit in equity

(1) (1882) 7 App. Cas. 235.

to recover such land at any time within twelve years next after the last payment of any part of the principal money or interest secured by such mortgage, although more than twelve years may have elapsed since the time at which the right to make such entry or bring such action or suit in equity shall have first accrued, anything in the said Act notwithstanding." Now it will be observed that this Act does not provide that the right to make an entry or bring an action or suit shall be deemed to have first accrued at the time of the last payment. It differs in this respect materially from s. 14 of the Act of 1833 dealing with acknowledgments in writing. As pointed out by Lord St. Leonards in *Wrixon* v. *Vize* (1) the Act of 1837 left the former Act still to point out when the right first accrued. If then, as I think is the true view, the mortgagee's right in the present case first accrued or must be deemed to have first accrued at the latest on March 27, 1903, at which time she was not of unsound mind, she cannot get any assistance from s. 3 of the Act of 1874. That section, according to its terms, only applies if the mortgagee was of unsound mind when the right "first accrued as aforesaid." It follows, I think, from the case of *Owen* v. *De Beauvoir* (2) that these words are equivalent to "first accrued or must be deemed to have first accrued." In the case therefore of an acknowledgment in writing made while a mortgagee is of unsound mind, the mortgagee could maintain an action at any time within six years after ceasing to be under disability. Between an acknowledgment in writing and a payment of interest, which is also an acknowledgment though not in writing, there would seem to be but little difference in principle. But I do not see how, in the face of the express words of the statute, I can hold that a disability beginning after the date when the right first accrued or must be deemed to have first accrued entitles the mortgagee to the protection given by s. 3 of the Act of 1874.

The action must be dismissed.

Solicitors: *Smiles & Co., for Steel & Broom, Cheltenham; McKenna & Co., for W. H. Russell, Cheltenham.*

(1) 3 Dr. & War. 104. (2) 16 M. & W. 547; 5 Ex. 166.

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March 2, 3, 4, 8, 9, 10.

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[1925. H. 2979.]

Landlord and Tenant—Lease—Covenants—Breach—Tenant's Covenant to keep all "pleasure grounds" in good and proper Order and Condition—Ornamental Lakes—Trout Fishing—Silting up of Mud—Measure of Tenant's Liability—Waste—Damages.

In 1915 the predecessor in title of the plaintiff demised to the defendant, who was a widow, a mansion house and grounds, together with the sporting and fishing rights, for a term of 13½ years, at the rent of 1150*l.* a year. Among the covenants in the lease was one by which the tenant covenanted at all times during the term to maintain, keep, and leave "all pleasure grounds," lawns, walks, borders and shrubberies in good and proper order and condition. Included in the pleasure grounds were ornamental waters consisting of two ponds and three lakes, which constituted an important and attractive feature of the pleasure grounds, and afforded boating and trout fishing. At the date of the lease there was some mud at the bottom of all the lakes (two of which had been cleaned out in 1906–7), but in 1915 they all were in good and proper order and condition. In 1925 the plaintiff complained to the defendant of various breaches of the above covenant, particularly in respect of the accumulation of mud in the lodge lake and in a portion of the upper boat lake, thereby causing deterioration in the trout fishing, and required these lakes to be cleared of mud and weeds. The defendant admitted some liability in respect of the lakes, and had regularly cut the weeds therein and kept in order the sluices and weirs, but repudiated liability to clean out any of the mud. In an action by the plaintiff to enforce the covenant, or, alternatively, for damages :—

Held, that, in order to comply with the covenant which was absolutely unqualified in terms, the defendant was liable to remove so much of the mud in the lodge lake, and also in a specified portion of the upper boat lake, as would leave a sheet of water of not less than 2 feet 6 inches in depth throughout.

Held, therefore, on the evidence, that the money contribution of the defendant towards the expense of such removal of mud would be 300*l.* in respect of the lodge lake, 75*l.* in respect of the specified portion of the upper boat lake, and 20*l.* would be awarded as damages for the deterioration in the trout fishing, the plaintiff to have the costs of the action.

Dashwood v. *Magniac* [1891] 3 Ch. 306 distinguished.

WITNESS ACTION.

By a lease dated April 29, 1915, the plaintiff's predecessor in title, Sir James Horlick, demised to the defendant, Enriqueta Angela Scully, widow, the mansion house of

Cowley Manor and grounds, situate in the parish of Cowley, in the county of Gloucester, together with the sporting and fishing rights therein mentioned, for a term of 13½ years from July 1, 1915, at the yearly rental of 1150*l*. The fee simple of the said hereditaments subsequently became vested in the plaintiff, Sir Ernest Burford Horlick.

By the lease the defendant covenanted (inter alia), (*a*) to (at all times during the said term) maintain, keep, and leave all pleasure grounds, lawns, walks, borders, shrubberies, and carriage drives, in good and proper order and condition, and to manage the gardens, pleasure grounds and glass-houses according to approved methods of gardening, and not, without the consent of the lessor in writing, to alter the style of the gardens and pleasure grounds; (*b*) not to do or permit any spoil or damage whatsoever to the said hereditaments or to the crops thereon. Included among the pleasure grounds of the said premises were ornamental waters, comprising two ponds and three lakes, a waterfall and terraces connecting the same, and all these constituted an important feature of the pleasure grounds, and provided amenities of boating, trout fishing and bathing within the ring of the demised premises. The plaintiff alleged that in breach of the covenants the defendant had (*a*) failed to maintain the said pleasure grounds, to wit the ornamental waters, in good and proper order and condition; (*b*) had failed to keep the stone and brick curbing round the ornamental waters in good and proper order and condition. On June 18, 1925, the solicitors of the plaintiff wrote a letter to the defendant complaining of breaches of the covenants contained in the lease and requiring her to remedy the same in accordance with the particulars given in a schedule to the letter wherein were stated the alleged breaches of covenants and the seven requirements—namely: (1.) The spring pond in front of the mansion house (marked (D) on the attached plan), to be thoroughly weeded and the accumulation of mud removed therefrom. (2.) The waterfall, terraces and lily pond connecting the said pond with the three lower lakes to be thoroughly weeded and cleaned. (3.) The lodge lake, (A) on the said

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plan, to be completely cleared of mud and weeds. (4.) The boat lake, (B) in the said plan, to be completely cleared of mud and weeds. (5.) The lower boat lake, (C) on the said plan, to be completely cleared of mud and weeds. (6.) All coarse fish to be cleared out of the lakes, marked (A), (B) and (C) on the said plan, and the same restocked with trout. (7.) The stone and brick curbing to all the lakes to be overhauled and made secure.

The plaintiff further alleged that the defendant had during the term of the lease wrongfully committed or permitted waste on the demised premises by suffering the ornamental waters, part of the pleasure grounds, and the stone and curbing round the same, and the trout fishing in the said waters to deteriorate and to fall out of good and proper order and condition, and the plaintiff claimed: (1.) A declaration that under the covenants in the lease it was incumbent upon the defendant to maintain, keep, and leave all the pleasure grounds, including the lakes and ornamental waters, in good and proper repair, order, and condition. (2.) A mandatory injunction ordering the defendant forthwith to do all acts of restoration, amendment, and cleansing as might be necessary to put the lakes and ornamental waters into such condition. (3.) Alternatively, damages for breaches of covenant, and for waste.

The defence was a denial of the main allegations in the claim, and of any committal of breaches of the covenants on her part contained in the lease. She also denied that during the term of the lease she had committed or permitted any waste on the demised premises, or that the plaintiff had suffered any material damage or injury by reason of any wrongful acts of the defendant, or at all. The defendant admitted some liability as to keeping the lakes in order, and had cut weeds periodically and kept the sluices and weirs in good condition, but she denied any liability to clear out any of the mud. The upper or lodge lake was fed by the river Churn, which rose in land belonging to the landlord, and after a short course brought down silt and mud into this lake, and then over a weir into the next lake, the upper

boat lake. The lodge lake was cleaned out thoroughly in 1906–1907, and also the upper part of the upper boat lake. The trout in the lodge lake were small, but larger in the upper boat lake. In the bottom or lower boat lake there were mainly coarse fish, and it had not been cleaned out for many years. The result of the evidence and the other facts sufficiently appear in the judgment of the Court.

Numerous witnesses were called on both sides.

Farwell K.C. and *S. P. J. Merlin* for the plaintiff. The first question is to determine the true construction of the material covenant in the lease, and what is the liability of the defendant thereunder. The "pleasure grounds" must include the ground covered with water, and according to the covenant in clause 7 of the lease the lakes must be kept and maintained "in good and proper order and condition." The lessee has also covenanted not to do or permit any spoil or damage to the hereditaments, and those covenants have been broken by the deterioration of the trout fishing owing to the accumulation of mud. Apart from the express covenants in the lease the question of waste arises. The law as to waste is referred to in Bewes on Waste, pp. 8, 10, 65, where *Lord Darcy* v. *Askwith* (1) and *Phillipps* v. *Smith* (2) are referred to. The cases bearing on the keeping up of ornamental waters, such as these, are only two. The principal one is *Dashwood* v. *Magniac* (3), which is distinguishable from the present. That was a case between tenant for life and remainderman, and as between capital and income expenditure, and it was held that the tenant for life was only answerable for income expenditure and not capital expenditure. That fact distinguishes it from the present case, although the words of the provision in the will in *Dashwood* v. *Magniac* (3), that the person in possession of the rents of the estate should from time to time keep the mansion house, parks, etc., in good repair, order and condition, are hardly distinguishable from the words of the covenant in

(1) (1618) Hob. 234. (2) (1845) 14 M. & W. 589.
(3) [1891] 3 Ch. 306.

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the present case. In that case there was also a lake and ornamental waters in the park, and the stream running through them became choked with weeds, mud and filth; but there was no evidence in that case to show what was the condition in which the lakes had been left by the testator. Here there is express evidence of the condition of the lakes when the defendant took possession. That is an important difference, as in that case the lakes had not been cleaned out for many years, and it would have been monstrous, as Chitty J. said, that the tenant for life should have to pay for the removal of mud which had accumulated in the testator's lifetime. *Bird* v. *Elwes* (1) was also a different case from the present, although there was there also an accumulation of mud in ornamental waters, but it was held that a landlord who had agreed to repair a house and premises was not bound to cleanse ornamental waters. The case of *In re Cartwright* (2) was a case of permissive waste in respect of dilapidated buildings and fences, and as between tenant for life and remainderman, the tenant for life was held not liable for such waste. In that case no express duty to repair was imposed by the will under which the estate was derived. That distinguishes it from the present.

Gover K.C. and *Lyttelton Chubb* for the defendant. In construing this lease and its covenants all the surrounding circumstances must be considered, especially the knowledge of the parties as to the subject-matter of the contract—namely, these artificial lakes. On the evidence it is established that the weeds have been regularly cut, and that in fact the lakes are more free of weeds now than before. The claim which the defendant came to meet according to the particulars of demands in the letter of June 18, 1925, which must be taken as part of the statement of claim, was that the two ponds and the three lakes should be completely cleared of mud and weeds. That would entail an outlay of some 2000*l.* or 3000*l.*, and would be wholly unreasonable in the case of a tenant with a short term, and could not have been in the contemplation

(1) (1868) L. R. 3 Ex. 225. (2) (1889) 41 Ch. D. 532.

of the parties. The alleged bad condition of the stone and brick curbing of the lakes is not borne out by the evidence, which was that a few stones here and there have dropped out, and the expense of replacing them would be trifling. One of the plaintiff's witnesses stated that no fish at all could live in the lodge lake owing to the fumes emanating from the mud in the summer, while Mr. Stanley Scully, a keen fisherman, said there was a very good stock of fish in that lake, and he had seen not less than forty trout there, more than existed in 1914, but they were small in size compared with those in the boat lake. Artificial lakes such as these are bound to fill up in time, and there is no method of stopping the accumulation of mud except by cleaning it out periodically. With regard to the meaning of the covenant to keep in good and proper order it cannot have been intended that this particular covenant should be without any qualification. In each of the six repairing covenants there was the qualification that reasonable wear and tear were excepted, and it is reasonable to imply some qualification in clause 7, that relating to the pleasure grounds, which followed. By the landlord's covenant all structural repairs were to be done by him, and this cleaning out of the lakes may well come under the head of structural repairs. Further, the covenant was to keep the "pleasure grounds" according to the approved method of gardening, which could not have applied to the lakes at all, or to impose upon the tenant the obligation to clean them out. With regard to the legal aspect of the case it is governed, as we submit, by the decision of Chitty J. in *Dashwood* v. *Magniac*. (1) That was a decision of a judge of co-ordinate jurisdiction, and upon a covenant containing words not really distinguishable from the words of the covenant in the present case. And it was held that a person having a limited interest in hereditaments, which included artificial ponds, was not as between herself and the person entitled to the inheritance, bound to do work of this character. So in *Bird* v. *Elwes* (2), which was a case between landlord and tenant, there was an agreement by the landlord to keep

(1) [1891] 3 Ch. 306. (2) L. R. 3 Ex. 225.

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the house and premises in good and substantial repair. It was held that the landlord was not bound under his agreement to cleanse a stream of ornamental water in the grounds from an accumulation of mud. Covenants of this character must be construed reasonably, and it would not be reasonable to make the tenant here liable for this large expenditure in clearing out the lakes. In *Foulger* v. *Arding* (1) there was a very special and wide covenant entered into by a lessee, under which the lessee was held liable to recoup the lessor. While in *Lister* v. *Lane and Nesham* (2), where there was a covenant by the tenants to "repair, uphold and maintain" the demised premises, and there turned out that there was an inherent defect in the premises, which had to be pulled down and rebuilt, it was held that the defect having been caused by the natural operation of time and the elements upon a house of faulty construction, the tenants were not liable under the covenant to make it good in an action by the landlords. On these authorities, therefore, we submit that this action should be dismissed, and if there is held to be any evidence of damage to the fishing, which we do not admit, it is slight, and no substantial damage has been proved in respect of the stone curbing round the lakes.

Farwell K.C. in reply on the whole case. With regard to the suggestion that there should be a qualification implied in the covenant to be construed because the six preceding covenants were qualified, the inference is just the opposite. If a qualification had been intended it would have been inserted. This covenant was wholly unqualified. As to the authorities referred to, *Bird* v. *Elwes* (3) was a case upon the construction of a totally different agreement in different language, and the Court held that a covenant to keep a house and premises in repair did not include the clearing out of an artificial stream of ornamental water. *Dashwood* v. *Magniac* (4) is the strongest authority for the defendant, but being a question arising between tenant for life and remainderman, it is no authority to preclude the Court

(1) [1902] 1 K. B. 700.
(2) [1893] 2 Q. B. 212.
(3) L. R. 3 Ex. 225.
(4) [1891] 3 Ch. 306.

from deciding this case differently as between landlord and tenant, and putting upon the covenant the construction which the Court thinks right. In *Dashwood* v. *Magniac* (1) Chitty J. came to the conclusion that the testator there only intended to put upon the tenant for life income expenses, and not capital expenses, and the expenditure claimed in that case was capital expenditure. Clearly also the cleaning out the lakes in the present case could not come under the head of "structural repairs" to be executed by the landlord, and he had also no right under the lease to go upon the premises during the tenancy and make the place unpleasant by clearing out the mud on to the park. Finally, we do not claim that all the mud should be cleared out, but only to reduce the amount of mud considerably in some of these lakes so as to comply with the "good and proper condition" provided for by the covenant. That would be, on the evidence, to leave a depth of not less than 2 feet 6 inches of water over the mud in the two lakes mainly affected. We do not claim anything now as to the spring pond in front of the house, or the bottom lake (C) after the evidence which has been given. As to the deterioration of the fishing, there is some evidence that the condition of the fish is much less satisfactory than in 1915, and the number has been depleted. There should be some damages therefore awarded for restocking with trout, and also for the injury to the walls round the lakes.

EVE J. [after stating the nature of the action with the claims made, and reading the notice of June 18, 1925, containing the seven alleged breaches complained of, continued:] Nothing can be made of the requirements relating to the spring pond, the waterfall terraces, and lily pond, or to the lower boat lake marked (C). The evidence has satisfied me that the allegations as to those parts of the premises cannot be supported, and they have not really been persisted in. That leaves to be dealt with the claims relating to the lodge lake marked (A), the upper boat lake marked (B), the clearing

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of these two lakes of coarse fish and the restocking of them with trout, and the alleged want of repair of the stone and brick curbing to all three lakes (A), (B) and (C). The question whether the plaintiff is entitled to any relief in respect of these matters depends on the contractual relationship created by the lease under which the defendant occupies the premises, and in construing the lease and determining what that relationship is, Mr. Chubb is justified in saying that regard must be had not only to the language one is called upon to interpret, but to such of the surrounding circumstances as may assist one in forming an opinion as to what may reasonably be supposed to have been in the contemplation of the contracting parties. The defendant had already been in occupation of the premises for a considerable time before the lease was signed. Not only was she fully acquainted with the lakes, but she cannot have failed to appreciate what an important addition they were to the amenities and attractiveness of the residence. The particular ones with which alone I have to deal are the first and second in a chain of three constructed in the depression constituting the bed of the river Churn by successive pounding up of its water as it runs through the grounds. Their aggregate area is about 5½ acres, and they not only enhance the beauty of the pleasure grounds, but they are and have for a long time past been well known in the county as affording some excellent fishing. I should not be justified in the circumstances in arriving at any conclusion other than this, that this lady, with two growing up sons—one of them, at any rate, a keen fisherman—was as fully alive as was the lessor to the importance attaching to the lakes and fishing from the point of view of an intending tenant. Moreover, I must take it as common knowledge that lakes constructed as these are get filled up in the ordinary course of things by the silt and other detritus brought down by the river and precipitated by the impounded water.

With these facts in mind we turn to the lease. The demise is framed in language which certainly includes the lakes. The property is let at a rent of 1150*l.* as a furnished mansion

with pleasure grounds and sporting rights over a considerable area outside the demised premises. Then follow the covenants entered into by the lessee. And having regard to the fact that this was a very large house and one that might involve a considerable outlay in respect of certain structural repairs, and that there were elaborate heating and electric lighting installations, it cannot be said that the covenants preceding that with which this action is concerned are otherwise than reasonable, seeing that they are so qualified as to relieve the lessee of a good deal of the burden which would otherwise have been imposed upon her. The covenant I have to construe is the one numbered 7, and Mr. Chubb has argued that reading the document as a whole some qualification ought to be imported into it of a nature similar to the qualifications to be found in the preceding covenants. That is not the view I take. Five or six covenants, each expressly qualified, followed by one in absolute terms with no express qualification, present a contrast which leads to the conclusion that the omission was intentional. I do not think it could have been passed over unnoticed, and I must deal with the covenant as it stands.

The pleasure grounds referred to therein include, in addition to these lakes and ponds, gardens, lawns and shrubberies of a delightful and attractive character, as appears from the photographs put in evidence. Their extent and character can be appreciated from the fact that their upkeep requires the constant employment of twelve, and the occasional addition of another three gardeners.

The covenant I am about to read deals with the pleasure grounds at large, and it is in these terms: "Also will at all times during the said term as to the hereditaments first described"—that is the house—"maintain, keep and leave all pleasure grounds, lawns, walks, borders, shrubberies, and carriage drives (including the carriage drive from the lodge marked 'A' on the said plan to the said messuage or dwelling-house) in good and proper order and condition, and will keep the trees and ornamental shrubs properly pruned and will renew any trees or shrubs which may perish

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or decay and will manage the gardens, pleasure grounds, and glasshouses, according to approved methods of gardening and not, without the consent in writing of the lessor, alter the style of the said gardens or pleasure grounds, and also will keep and leave the kitchen garden well stocked according to the season of the year and will keep the glasshouses adequately heated and deliver up the said glasshouses at the end of the lease properly stocked and equipped as the same are at the date hereof, and also will employ and pay a sufficient number of gardeners and others for the purposes aforesaid." Now there is a covenant which is in as wide and general language as it is possible to conceive, and although in terms the lakes are not mentioned, it is conceded that the area of the lakes is included under the expression " all pleasure grounds," and we have therefore a covenant absolute in terms that the lady will at all times during the term keep all the pleasure grounds, which is equivalent to saying the lakes and pleasure grounds, in good and proper order and condition. The covenant being without qualification, express or implied, I have to interpret what its operation is.

On the one hand, the landlord says: " That means what it says, and whatever it may involve, to whatever expenditure you may find yourself committed, the obligation is upon you in express terms to maintain these lakes in good and proper order and condition, and inasmuch as I allege and can prove that the lakes are not in good order and condition by reason of the fact that the mud has accumulated in them to a depth which threatens their continuance as lakes, I must call upon you to remove that mud, or at least as much of it as renders the lakes out of good order and condition." The tenant says: " No. Although I admit being under some liability in respect of the lakes, and that there are certain recurring acts in connection with them that I am bound to do under this covenant, I repudiate liability to remove any of the mud." She admits that she must once or more in each year cut and remove the weeds. Whether she admits liability to maintain the sluices by which the level of the water in each successive lake is maintained is

not clear, but I rather gather that she does not, and that if any one of these were to give way or fall into such disrepair as to allow all the water to pass out of the lake, she would repudiate all obligations to restore or repair it. The result is that according to the defendant it is the lessor who must keep the lakes clear of mud if he wishes to preserve them. How far is this contention consistent with the lease? The lessor did thereby expressly take upon himself certain obligations. He was to execute all structural repairs, and repairs to the roof, to the exterior of the premises, and to the main walls and drains thereof, and for these purposes was to be allowed to enter upon the demised premises. It has been argued that the clearing out of the ponds would be a structural repair, and that the provisions relating to the execution of such repairs and the entry on to the demised premises therefor would extend to this work. I cannot agree. I do not think the clearing out of the ponds could properly be held to be a structural repair, and if not one is faced with this result if the lessee's contentions be sound; neither she nor the lessor is bound to do the cleaning, and if the latter wishes to do it she is under no obligation to permit him to enter for the purpose. I do not think this is a condition of affairs which the parties can reasonably be deemed to have contemplated when concluding their contract.

It comes therefore to this, that I must construe clause 7 as it stands and without importing into it any of the provisions (qualifying or otherwise) of the other covenants, and the first question is whether there is any authority binding upon me which compels me to impose upon the language of this clause contained in a document of this nature a meaning sufficiently restricted to relieve the lessee from liability to do work which it is admitted must be done at some time or another if the lakes are to be maintained—not merely in good order and condition—but at all. Upon this point the defendant relies mainly on the late Mr. Justice Chitty's judgment in *Dashwood* v. *Magniac*. (1) It is urged that in that case the learned judge construed language not really

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distinguishable from that employed here as inoperative to impose on the tenant for life to the relief of the inheritance the obligation of clearing out certain artificial ponds, part of the settled property, and that in accordance with the settled practice this Court ought to adopt and act upon that decision in the absence of any context sufficient to impress the language with a different construction in this case. I agree—and may I add that there is no opinion to which I pay greater respect than that of the learned judge whose decision it is.

But before holding oneself constrained to apply the construction of particular language adopted in one case to another case one must examine the facts and circumstances of each case with some care, and be satisfied that they present no such dissimilarity as to warrant a different interpretation being put upon such language. *Dashwood* v. *Magniac* (1) was an action wherein the tenant for life in possession and the remainderman under the will of Sir George Dashwood were claiming to recover from the estate of the then late tenant for life, the testator's widow, large sums for alleged waste in cutting timber and for neglect of the duties and obligations in relation to repairs imposed upon her by the testator's will. Amongst other neglects it was alleged that she had suffered two sheets of ornamental waters covering some 15 acres in the park to become foul and choked with weeds, mud and filth, and it was claimed that the cost of clearing and scouring out these lakes ought to be borne and paid by the widow's estate. By his will the testator declared that his widow should "from time to time keep his mansion house and the outbuildings, parks, grounds, fences, gates and appurtenances thereto belonging in good and substantial repair, order and condition." According to the learned judge the plaintiffs launched their case as if the obligation was an absolute obligation to put the lakes into such a condition as would meet all the modern notions as to the state in which such lakes ought to be. No evidence was given as to when the lakes were made nor as to their condition at the date of the testator's death. Evidence was given

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that artificial lakes ought to be cleansed of mud once in 30, 40 or 50 years, but no practice to clear the mud out of these particular lakes was proved. On the contrary they appeared never to have been cleared out at all since they were made, and there was no evidence to show during what period the mud and filth had accumulated. No complaint was made of injury to the fish. The cost of doing the work required by the plaintiffs would have amounted to some 2000*l.* Upon these facts and bearing in mind the uncertain duration in point of time of the life tenant's enjoyment, the learned judge came to the conclusion that some qualification must be placed upon words which might otherwise impose on the life tenant the liability for the heavy expenditure involved in draining off the water, removing the mud by one expensive operation, and carting it away, and accordingly he restricted her obligation to the keeping of the banks and sluices in good and substantial repair, order and condition, and expressed his conclusion that the operation for which the plaintiffs were seeking to make her estate liable pointed to an expenditure on account of capital rather than income.

There is little in common between the main facts of that case and this. I have not here to estimate the respective burdens imposed on successive beneficiaries by a testator, who one may assume intended to distribute them equitably, but to construe a contract relating to a subject-matter of a nature well known to both parties as being one likely to involve expenditure, and concluded after adequate consideration and discussion. Nor is the position affected by any uncertainty as to the duration of the lessee's interest or complicated by any consideration as to the relative liabilities of capital and income. For these reasons and others founded on the different nature of the evidence tendered in the two cases I do not think that I am bound to restrict the covenant in this case to the limits imposed on the testator's declaration in *Dashwood* v. *Magniac.* (1) What then is the true measure of the lessee's liability in respect of the lakes under this covenant to maintain, keep and leave them in good and

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proper order and condition? Does it mean that in order to comply with the covenant the lakes must be kept and ultimately delivered up practically cleansed of mud or, regard being had to the primary purposes for which the lakes were constructed and maintained, will the covenant be complied with so long as those purposes are attained? In other words, if the lessee does what is necessary to preserve their amenities and the fishing, will not the covenant be satisfied? I am convinced that I ought not to construe it according to the first alternative, nor indeed, has Mr. Farwell insisted on any such claim. His case is that when the lease was granted the lakes were in good and proper order and condition, that the defendant has neglected to keep them in that state, and that she is now liable to make good to the plaintiff the expense which must be incurred in remedying the deterioration brought about by her neglect. It is true that this has not been the attitude of the plaintiff throughout. From December, 1925, when the claim was first advanced in a letter, written under a complete misapprehension of the facts, down to the trial the plaintiff had been insisting that the defendant was bound to cleanse completely all the ornamental ponds, and it was only at the hearing when the facts as to the several sheets of water and their treatment in the past came to be appreciated, that the more reasonable claim was substituted. The relevant facts established at the trial in reference to the two lakes with which alone I have to deal are that the upper one—known as the lodge lake and marked (A) on the plan—was cleared out in 1906 or 1907, and that at the same time a small part of the top end of the second lake—known as the upper boat lake and marked (B)—was also cleansed. There is no evidence of any cleansing of the other parts of this lake. In the interval between 1907 and the granting of the lease about 1 foot of mud would have been deposited in the lodge lake. According to the evidence of the competent witnesses who have been called on both sides the deposit of further mud, which has been going on steadily since the date of the lease, has not as yet affected the amenities or appearance of the lakes.

Their unanimous opinion on this point is confirmed by the photographs which have been exhibited. But these witnesses are equally unanimous on this, that this further deposit has brought about a condition of things in the upper lake and in the part of the upper boat lake which was cleared out in 1906 or 1907, calculated not only seriously to affect the fishing, but also before long to destroy the lake altogether. It has been proved that in 1925 at places in the lodge lake the water was less than a foot above the surface of the mud, and at this date the foot has probably been reduced to 8 inches or even less. At no point in this lake was there in 1925 more than 2 feet 1 inch of water over the mud, and the deepest water now is probably less than 2 feet. The same conditions exist in the top end of the upper boat lake. The evidence is conclusive that more water than this is necessary if the fishing is to be preserved, and the only way of increasing the water is by reducing the mud. It follows from the evidence which I have just summarized that the lakes are not now in good and proper order and condition in that too much mud has been allowed to accumulate in them, and the question arises how much of this mud ought to be removed or, putting it in another way, by how much ought the average depth of the water above the mud to be increased? I asked Mr. Warner Turner—who gave his evidence with great fairness—whether the provision of 18 inches of water above the mud would be satisfactory, and he said, "No, not quite," adding, in cross-examination, that a depth of from 2 feet to 2 feet 6 inches would in his opinion be necessary in order to maintain the fishery. To bring about this condition—that is, an average depth of 2 feet 6 inches of water in the lodge lake—would involve the removal of mud to the depth of from 1 to 2 feet over the whole area, and these facts furnish in my opinion one of the factors for measuring the defendant's liability. It would not be a practical course to attempt to remove the surplus deposit only. The one practical way of meeting the position is by draining off the water, removing all the mud, and spreading it over some suitable area in the near neighbourhood. Evidence has been given as to the

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cost involved in this undertaking, and it works out at a figure of 4*s.* 6*d.* per cubic yard of mud removed. It has been suggested that one way of ascertaining the defendant's liability would be to treat the 3 feet of mud in the lake as having accumulated at a uniform rate over the twenty-one years which have elapsed since the last cleansing, and to attribute one-third of the cost of removing the mud to the seven years which preceded the lease and the remaining two-thirds to the fourteen years covered by the lease, but inasmuch as this complete cleansing of the lake would leave in parts a depth of water considerably in excess of the 2 feet 6 inches, which is all that is required to render the lake in good and proper order and condition, I cannot regard the suggested method as fair to the lessee. I prefer therefore to fix the liability on a monetary basis. So much for the lodge lake. As to the upper boat lake (B) the deposit in that is less, and the accretion has gone on at a slower rate than in the lodge lake. But there does exist for a comparatively short distance from the weir an area where the depth of the water above the mud is insufficient. It is difficult to ascertain how much of this lake was cleansed in 1906 or 1907. [His Lordship considered the evidence on this point and continued :] I think it would be a fair matter to say that for a distance of 150 feet from the foot of the weir the lessee must be held liable to remove so much of the mud as will leave a sheet of water of not less than 2 feet 6 inches in depth. I must now endeavour to arrive at the sum which the lessee must contribute to the cost of the inevitable cleansing—a sum which will compensate the landlord as covenantee and not impose too heavy a burden on Mrs. Scully as covenantor. The mud in the lodge lake was estimated at 2764 cubic yards, when Mr. Eversted's section was made in 1925, and that quantity must be somewhat increased now. As I have already said, the cost of removing it has been fixed at 4*s.* 6*d.* or thereabouts per cubic yard. On that footing the complete clearance would cost in round figures 700*l.* Two-thirds of 700*l.* would be 466*l.*, but, as I have already stated, I do not think the lessee ought to be called on to pay two-thirds of

the cost, because the removal of 2 feet of mud over the whole lake would leave in many parts a depth of water in excess of 2 feet 6 inches. On the other hand the removal of one foot would not leave a depth of 2 feet 6 inches. In these circumstances I must find a figure between one-third and two-thirds, and I think a contribution of 300*l.* will be a fair and proper one to be made by the lessee in respect of the lodge lake. The cost of taking out sufficient mud over the area I have indicated at the top end of the upper boat lake to leave a sheet of water 2 feet 6 inches in depth can, I am informed, be ascertained by the respective surveyors, and must be added to the 300*l.* (subsequently assessed at 75*l.*). The evidence relating to the further claim, founded on the alleged deterioration of the fishery and its consequent depreciation in value, is vague and unsatisfactory, and such as makes it difficult to arrive at any satisfactory conclusion. [His Lordship discussed the evidence and added 20*l.* damages in respect of the injury to the trout fishing.] The last claim concerns the curbing and stone walls round the ponds. That is a very trivial matter, and one in respect of which I do not propose to award any damages. As to costs I should hesitate a long time before acceding to the view that there has been anything in the conduct of these proceedings of an oppressive or harsh character, and in all the circumstances I think the plaintiff is entitled to the costs of the action.

Solicitors: *Markby, Stewart & Wadesons; Indermaur & Clark.*

G. M.

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April 27; *June* 2.

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[1926. P. 2695.]

Law of Property—Undivided Shares—Entirety vested in Possession, but subject to Incumbrances—In whom vested—Statutory Trusts—Solicitor Trustee of Will—Power to charge for professional Services in Execution of statutory Trusts—Law of Property Act, 1925 (15 *Geo.* 5, *c.* 20), *s.* 205, *sub-s.* 1 (*vii.*); *Sch. I., Part IV., para.* 1 (1.) (*a*), (2.), (3.), (9.).

By his will, dated November 13, 1909, the testator directed that from and after the death of his wife his trustees should stand possessed of certain hereditaments, which he described as the share of his daughter E., upon trust to pay to her husband an annuity of 500*l.* for life, which in certain events might be determined, and he empowered the husband by will or codicil to charge the share with the payment of any sum not exceeding 10,000*l.* for the benefit of one or more of the issue of his daughter, and directed his trustees to raise the money by a sale or mortgage of the share and hold it in trust for the person or persons entitled. Subject as aforesaid, the trustees were to stand possessed of the share and the net income thereof in trust, in the events that happened, for the children of E. in equal shares. The testator died in 1910, his wife in 1911, and E. before the date of the will, leaving a husband surviving. E. had four children who all survived the testator and attained vested interests. The trustees, who were also executors, were given no power of sale by the will and were not trustees of the will for the purposes of the Settled Land Acts, 1882 to 1890. The testator declared that any executor or trustee of his will who was a solicitor, or a person engaged in any profession or business, might individually, or through his firm, act in the course of his profession or business on behalf of the executors and trustees, and charge for so doing :—

Held, that immediately before the Law of Property Act, 1925, came into operation the legal estate in E.'s share was vested in the trustees of the will, and, subject to the annuity of 500*l.* and the power to charge, the land was held in four undivided shares vested in possession. The case therefore fell within para. 1, sub-para. 1, of Part IV. of the First Schedule to the Law of Property Act, 1925, and the land was vested in the trustees upon the statutory trusts, the incumbrances being divested under para. 1 (1.) (*a*). The annuity was an incumbrance within s. 205, sub-s. 1 (vii.), of the Law of Property Act, 1925, and the consent of the annuitant to any sale would have to be obtained under para. 1 (9.) of Part IV. The power to charge, which might never be exercised, was not an incumbrance. If and when exercised it would operate on the proceeds of sale in the hands of the trustees. Any executor or trustee of the will who was a solicitor or a person engaged in a profession or business was entitled under the will to charge for work or business done in the execution of the statutory trusts, because such work or business would be done on behalf of the executors and trustees.

ADJOURNED SUMMONS.

Joshua Pedley died on April 8, 1910. By his will, dated November 13, 1909, he devised unto and to the use of his trustees divers freehold hereditaments described, in clause 18, under the heading "First, Secondly, Thirdly and Fourthly," upon trust during the life of his wife out of income to pay certain annuities, and to pay the balance of the income to his said wife during her life. She died in 1911.

By clause 20 the testator provided that from and after the decease of his wife his trustees should stand possessed of the hereditaments described in clause 18 under the heading secondly, referred to as Eleanor Margaret Wallace's share, as follows: "(*a*) Upon trust out of the net rents and profits and income thereof to pay an annuity of 500*l.* to the said William Dollin Wallace during his life, but only until the happening in connection with him of any of the determining events hereinafter mentioned. (*b*) And I empower the said William Dollin Wallace by will or codicil to charge all or any part of such share with the payment of any sum or sums of money not exceeding in the whole 10,000*l.* together with interest from the decease of my said wife at a rate not exceeding 4 per cent. per annum for the benefit of all or any one or more exclusively of the others or other of the issue whether children or remoter descendants of the said Eleanor Margaret Wallace at such time and if more than one in such shares and generally in such manner as the said William Dollin Wallace shall by will or codicil appoint And I direct that my trustees shall by sale or mortgage of such share or any part thereof raise any sum or sums charged as aforesaid and pay the same to or hold the same in trust for the person or persons thereto entitled.

(*c*) And subject as aforesaid shall stand possessed of such share and the net rents income and profits thereof in trust in equal shares for all or any the children or child of the said Eleanor Margaret Wallace living at my death who have or has attained or shall attain the age of twenty-five years or being female have or has married or shall marry under that age and for all or any the issue living at my death who shall

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attain the age of twenty-five years or being female marry under that age of any child of the said Eleanor Margaret Wallace who shall die in my lifetime leaving issue living at my death such issue to take through all degrees according to their stocks in equal shares the share or shares which their parent would have taken if living at my death and having then attained a vested interest and so that no issue shall take whose parent is living at my death and so capable of taking."

Clause 22 ran: "The determining events hereinbefore referred to in connection with the said William Dollin Wallace are his doing or attempting to do or suffering any act or occurrence whereby or by means of which through operation of law or otherwise the benefit of any provisions hereinbefore provided for him if conferred on him for his life without restriction would pass to or become vested in any other person or persons or a corporation."

By clause 35 of his will the testator declared: "that any executor or trustee for the time being hereof being a solicitor or a person engaged in any profession or business may either individually or through any firm of which he is a member act in the course of his profession or business on behalf of the executors and trustees for the time being of this my will and make all usual and proper charges for so doing in the same manner as if he were not himself executor or trustee and notwithstanding that the work done may not be within the strict limits of his vocation."

Eleanor Margaret Wallace, daughter of the testator, died before the date of the will, leaving her husband the defendant William Dollin Wallace her surviving. She had four children who all survived the testator and attained vested interests—namely, the two plaintiffs, who were each absolutely entitled to their shares, and Mrs. Williamson and Mrs. Oxley, whose respective shares were vested in the trustees of their respective marriage settlements.

There was no power of sale conferred by the will upon the trustees thereof, nor were the trustees appointed trustees for the purposes of the Settled Land Acts, 1882 to 1890.

The three trustees were defendants to the summons and were also the testator's executors who proved his will.

The summons asked in whom, on the coming into force of the Law of Property Act, 1925, E.'s share vested; whether it vested in the trustees free from the annuity and the power of charging 10,000*l.*; whether the consent of William D. Wallace was necessary to enable the trustees to exercise the trust for sale and power of management vested in them, by reason of holding the share on the statutory trusts; and whether such of the trustees who were solicitors or persons engaged in any business or profession were entitled to charge for their services in executing the statutory trusts.

Winterbotham for the plaintiffs. Part IV. of the First Schedule to the Law of Property Act, 1925, applies and the land is held upon the statutory trusts. The question is which sub-paragraph of para. 1 applies to the present case. Sub-para. 1 literally applies. Sub-para. 3 also applies if the decision in *In re Ryder and Steadman's Contract* (1) is correct. If it is not correct the land may still be settled land under the old law by reason of the power to charge portions to arise in the future: *In re Earl of Carnarvon's Highclere Settled Estates.* (2) As between the two sub-paragraphs, (1.) only contemplates incumbrances as capable of existing in priority to the undivided share, while (3.), as amended, refers to "interests powers and charges." (Compare Settled Land Act, 1925, s. 36, sub-s. 2.) In this case the power to charge is not an incumbrance and it is submitted that sub-para. 3 applies. If sub-para. 3 applies the next question is whether the defendant trustees are trustees of the "settlement" within the meaning of that sub-paragraph by reason of being executors of the testator's will: see Law of Property Act, 1925, s. 205 (xxvi.), and Settled Land Act, 1925, s. 30, sub-s. 3.

William Wallace is an incumbrancer in respect of his annuity (see Law of Property Act, 1925, s. 205 (vii.)), and his consent to a sale is necessary, but a power to charge is not an incumbrance until it is exercised. In determining

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whether a solicitor trustee is entitled under clause 35 of the will to charge for acting in the execution of the statutory trusts an element to consider is that the duties imposed on trustees by the Law of Property Act, 1925, are quite different from and more extensive than their duties under the will.

P. H. L. Brough for the annuitant. It is submitted that sub-para. 3 of para. 1, as amended, of Part IV. of the First Schedule gives a context which excludes the annuity from being an incumbrance, even though an annuity is within the definition of an incumbrance in the Law of Property Act, 1925.

H. W. Dollar for the trustees of the will.

C. D. Myles for the trustees of two sub-settlements.

RUSSELL J. The first question raised by this summons is in whom on the coming into force of the Law of Property Act, 1925, certain hereditaments vested, the particular hereditaments being described as the hereditaments constituting Eleanor Margaret Wallace's share originally comprised in the settlement made by the will of Joshua Pedley deceased. The Law of Property Act, 1925, came into operation on January 1, 1926. Immediately before that date the Eleanor Margaret Wallace share stood thus : the legal estate was vested in the trustees of the will ; William Dollin Wallace was entitled out of the net rents and profits and income thereof to an annuity for his life, but capable of being determined during his life, of 500*l.* per annum ; he had also a power to charge that share by will with a sum of 10,000*l.* for the benefit of such one or more of the issue of Eleanor Margaret Wallace as he should appoint, and the trustees were directed to raise any sum so charged by sale or mortgage of the share. Subject to the annuity and the power to charge the land was held in four undivided shares vested in possession.

Part IV. of Sch. I. to the Law of Property Act, 1925, accordingly applies. The question is within which of the four cases specified in para. 1 of Part IV. does the case fall.

Sub-para. 2 is inapplicable. Sub-para. 3 is applicable only if the entirety of the land is settled land held under one and the same settlement. As to the decision of Romer J. in *In re Earl of Carnarvon's Highclere Settled Estates* (1), the land was not at the relevant time settled land under the old Settled Land Acts. The absolute interests were subject only to the charge of the annuity which was a charge vested in possession. The 10,000*l.* was not charged ; indeed it was and is impossible to say whether the power to charge will ever be executed. It was, however, contended that the words " is settled land " in sub-para. 3 meant settled land under the Settled Land Act, 1925, and this upon the authority of a decision of Astbury J. in *In re Ryder and Steadman's Contract* (2). I postponed delivering judgment to await the judgment of the Court of Appeal in an appeal which was then pending from Astbury J.'s decision. The Court of Appeal has now decided (3) that the words " is settled land " mean settled land under the old law. Accordingly sub-para. 3 does not apply to the present case. The land was not " settled land . . . . held under one and the same settlement."

The choice lies therefore between sub-para. 1 and the residuary provision, sub-para. 4. The case seems to me to fall exactly within the wording of sub-para. 1 : the entirety of the land being vested in the trustee defendants in trust for persons entitled in undivided shares, namely, two of the children, and the marriage settlement trustees of the other two.

The result is that I decide that the land is vested in the trustee defendants upon the statutory trusts, the incumbrances, if any, being divested under para. 1 (1.) (*a*).

In the present case the annuity is in my opinion an incumbrance within the definition contained in s. 205, sub-s. 1 (vii.) ; but the mere power to charge a sum by will which may never be exercised is not. This power if and when exercised would no doubt take effect and operate upon the

(1) [1927] 1 Ch. 138, 155. (2) [1927] 1 Ch. 509.
(3) Ante, p. 62.

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proceeds of sale in the hands of the trustees. The consent of the annuitant to any sale will in my opinion have to be obtained under para. 1, sub-para. 9, of Part IV., though a purchaser will not be bound to see or inquire whether such consent has been given. A further question arises as to the effect upon the annuity if the annuitant gives any such consent—namely, would the giving of such consent be a "determining event" within clause 22 of the will. [His Lordship read the clause.] In my opinion the giving of any such consent is neither within the letter or the spirit of that clause, the doing of an act whereby or by means of which the benefit of the annuity would pass to or be vested in any other person or persons or a corporation.

The final question for determination is whether clause 35 of the will applies in respect of work or business done by such of the defendant trustees as are solicitors or persons engaged in any profession or business or their firms in relation to the execution of the statutory trusts. I see no reason why it should not apply. Work done in relation to the execution of the statutory trusts will still be done by him or them acting on behalf of the executors and trustees of the will.

Solicitors: *Pedley, May & Fletcher.*

J. B. B. M.

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March 22, 23, 24.

[1925. B. 5657.]

Alien—Nationality—"Nationals of former Austrian Empire"—Charge on Property in United Kingdom—Acquisition of new Nationality ipso facto in accordance with Treaty of Peace with Austria—Company's Nationality—Treaty of Peace with Austria, Arts. 53, 70, 75, 249 (*b*), 263 *—Treaty of Peace (Austria) Order*, 1920.

Upon the proper construction of the material Articles of the Treaty of St. Germain which came into force on July 16, 1920, a Czecho-Slovakian corporation as well as an individual can acquire ipso facto Czecho-Slovakian nationality, and therefore the property of such a corporation within the territory of Great Britain at that date is entitled to the benefit of the exemption provided by Art. 249 (*b*) of the Treaty from liability to the charge in favour of the Administrator of Austrian Property created by that Article and by clause 1, sub-clause ix., of the Treaty of Peace (Austria) Order in Council of August 13, 1920.

WITNESS ACTION.

The Bohemian Union Bank (hereinafter called "the Bank"), incorporated in 1872, under the laws of the Austrian Empire, its seat and place of registration being at Prague, was an Austrian company up to August 9, 1918, when Czecho-Slovakia was separated from Austria and became an independent Republic. As from that date, therefore, having no longer its seat in Austria, the bank ceased to be an Austrian company.

The new State, by Art. 2 of Law 11 of October 28, 1918, adopted provisionally, mutatis mutandis, the pre-existing laws of Austria; and, as a result of that law, companies having their seat in Czecho-Slovakia acquired the legal status of Czecho-Slovakian corporations.

Under the Treaty of Peace signed at St. Germain-en-Laye, on September 10, 1919, Czecho-Slovakia, being one of the Allied and Associated Powers who were signatories to that Treaty, received formal recognition as a free independent and Allied State.

The defendant, purporting to act under those provisions

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of the Treaty (1), whereby the Allied and Associated Powers reserved the right to retain and liquidate all property within their territories belonging at the date of the Treaty to "Nationals of the former Austrian Empire," and under the provisions of clause 1 (ix.) of the Treaty of Peace Order, 1920 (whereby the right so reserved was exercised), had retained certain property of the bank consisting of money and securities of the value of over 50,000*l*.

The plaintiffs claimed a declaration that they were entitled to the possession of the property so retained and an order for the delivery over of the same.

Sir Patrick Hastings K.C. and *J. W. Scobell Armstrong* for the plaintiffs. "Nationals of the former Austrian Empire" in Art. 249 (*b*) of the Treaty was intended to have the same meaning as "Austrian nationals," quite independently of the exception; the Article applies only to nationals of the former Austrian Empire who became nationals of the new Austrian Republic. It is submitted that the decision of Eve J., who took a different view of this point in *Rothschild* v. *Administrator of Austrian Property* (2), is wrong. In that case the facts were different, and Eve J. had regard only to the language of the Schedule to the Order in Council. The case of *Kramer* v. *Attorney-General* (3), which was not cited

(1) Art. 249 (*b*) of the Treaty: "Subject to any contrary stipulations which may be provided for in the present Treaty, the Allied and Associated Powers reserve the right to retain and liquidate all property, rights and interests which belong at the date of the coming into force of the present Treaty to nationals of the former Austrian Empire, or companies controlled by them, and are within the territories, colonies, possessions and protectorates of such Powers (including territories ceded to them by the present Treaty) or are under the control of those Powers.

"Persons who within six months of the coming into force of the present Treaty show that they have acquired ipso facto in accordance with its provisions the nationality of an Allied or Associated Power, including those who under Art. 72 or 76, obtain such nationality with the consent of the competent authorities, or who under Art. 74 or 77, acquire such nationality in virtue of previous rights of citizenship (pertinenza), will not be considered as nationals of the former Austrian Empire within the meaning of this paragraph."

(2) [1923] 2 Ch. 542.

(3) [1922] 2 Ch. 850; [1923] A. C. 528, 533.

before him, decided that in construing the portions of the Treaty which are scheduled to the Order in Council, the Court is entitled to look at the language of the Treaty itself. The expression "nationals of the former Austrian Empire" cannot be held to include persons, either physical or juridical, who at the date of the Treaty were Czecho-Slovakian nationals, a view which is borne out by the French text, which is the authoritative text of the Treaty. Art. 272 makes it plain that the nationality of a company might be changed by the transfer of territory. The Treaty recognizes that a company may possess a nationality—that is to say, by a figure of speech: *Daimler Co.* v. *Continental Tyre and Rubber Co.* (1)—and that if its seat is in territory which was formerly Austrian, but which after the Treaty became Czecho-Slovakian, it changes its nationality. Art. 263 recognizes that both individuals and juridical persons might acquire ipso facto Czecho-Slovakian nationality. Art. 70 is quite general, and includes juridical persons as well as physical; citizenship in Art. 70 means the possession of civil rights. Therefore a company is capable of acquiring nationality in accordance with the Treaty. Art. 75 is a limitation only on Art. 70. It is clearly recognized by the Treaty that companies are capable of acquiring ipso facto the nationality of an Allied or Associated Power, and as such words as "national" and "person" are frequently used therein in circumstances which indicate that they were intended to include companies, the latter must, for the purpose of the Articles relating to nationality, be treated as included in the category of persons "possessing rights of citizenship" in the new States. The plaintiff company having given notice under the proviso to Art. 249 (*b*) claiming the nationality of a Czecho-Slovakian has shown that it is a person who has ipso facto acquired the nationality of Czecho-Slovakia. In any case, if Art. 70 does not apply to a company, companies must fall within the wider category of those persons who obtained Czecho-Slovakian nationality ipso facto (de plein droit) in accordance with those provisions of the Treaty which recognize Czecho-Slovakia as an independent

(1) [1916] 2 A. C. 307, 339.

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nation: see Arts. 263, 53, and 89. The plaintiff company being a Czecho-Slovakian national de facto at the date of the Treaty, became one by force of the Treaty de jure or de plein droit. To hold otherwise would do violence to the whole spirit and intention of the Economic Articles of the Treaty, since companies which had lost their Austrian nationality owing to the transfer of their "seat" to Czecho-Slovakia would be without the right to claim as Austrian nationals compensation from the Austrian Government under Art. 249 (*j*), and although they had become Czecho-Slovakian companies under Czecho-Slovakian law, they would be in a worse position than Austrian companies, as their property would in effect be liable to confiscation without redress.

Sir Thomas Inskip S.-G. and *Stamp* for the defendant. The expression "nationals of the former Austrian Empire" bears the meaning put upon it by Eve J. in *Rothschild* v. *Administrator of Austrian Property* (1), and includes nationals of the new Czecho-Slovakian Republic who were nationals of the former Austrian Empire. It is the Order in Council which has to be construed; the Treaty may only be referred to as throwing light on the matter when the Order is ambiguous: *Kramer* v. *Attorney-General.* (2) It is not disputed that upon the signing of the Treaty the inhabitants of Prague became nationals of Czecho-Slovakia, and, but for the fact that the plaintiffs were nationals of the former Austrian Empire, their property here would not be subject to the charge. The only persons entitled to the benefit of the proviso to Art. 249 (*b*) are persons who under the Articles relating to nationality contained in s. VI. of Part III. of the Treaty, became ipso facto nationals of the new State. Since the acquisition of nationality ipso facto under those Articles is confined to persons "possessing rights of citizenship" or "pertinenza" in the territories of the new States, the benefit of the exemption is confined to physical persons, and does not extend to corporations. A company therefore cannot possess citizenship or pertinenza. Art. 76 involves the statement that no one can obtain nationality unless he has "pertinenza";

(1) [1923] 2 Ch. 542. (2) [1922] 2 Ch. 850; [1923] A. C. 528, 533.

that article therefore can apply to individuals only, and if an individual can prove citizenship before the revolution he can claim to be a national of the new State under Art. 70. Only those juridical persons or corporations expressly dealt with under Art. 75—namely, Italian—can have nationality. There is nothing in the Articles which affect a nationality already acquired at the date of the Treaty. The Treaty implies that, in order to escape from the charge, the nationality of one of the Allied and Associated Powers must be acquired ipso facto, that is to say, by virtue of the Treaty and subject to its conditions.

CLAUSON J. In this case the Bohemian Union Bank sue the Administrator of Austrian Property and claim a declaration that they are entitled to certain property in England which is admittedly the property of the plaintiffs, unless there is something in the Treaty and the Order in Council, to which I will refer, which deprives them of their title to it.

Previous to August, 1918, Prague was a city in Bohemia, forming part of the Austrian Empire. The Bohemian Union Bank (hereinafter called "the Bank") was a bank clothed according to the Austrian law then prevalent in Prague, with the status of a corporation. Its principal place of business, or what is sometimes spoken of as its seat, was in Prague. It was carrying on business in Prague. It derived its position as a corporation and, accordingly, as a legal entity, from the law of the Austrian Empire, which operated in Prague as part of the Austrian Empire. All this is not in dispute.

In August, 1918, the belligerent Powers who were then still at war with Germany and Austria, recognized in some shape or form that a change had de facto occurred in that part of the territory of the Austrian Empire within which Prague was comprised, by reason of which a separate State, under the name of the Czecho-Slovak State, had been set up. That State did not, as I understand it, become an organized body with formal laws until October 28, 1918, a day which was conveniently referred to by counsel for the defendant as the birthday of the Czecho-Slovak State, a date which,

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it is agreed, is regarded in Czecho-Slovakia as the date from which the Czecho-Slovak State dates its birth. On that day laws were adopted for the government of the new State, which in effect were those laws of Austria which were then in force in that part of Austrian territory, which then became Czecho-Slovakia, but with such modifications as were necessary to adapt those laws to the new and independent State. At that moment the territory of the new State was probably not quite clearly defined; but as to the fact that Prague was in that territory there is, of course, no dispute at all.

It was agreed by the Solicitor-General, appearing for the defendant, that as from October 28, 1918, the bank was according to Czecho-Slovakian law a Czecho-Slovakian company, and, indeed, I think the Solicitor-General went so far as to admit, a Czecho-Slovakian national. At all events, from that date, just as there were a large number of individuals in Prague and elsewhere within the ambit of the Czecho-Slovak State who were unquestionably in possession of Czecho-Slovakian civil rights and, in that sense, were Czecho-Slovakian citizens and were regarded by the State and by themselves as being Czecho-Slovakian nationals, so the bank occupied the same relation towards the Czecho-Slovakian State and Czecho-Slovakian nationals as in the old days, before August, 1918, it had occupied in regard to the Austrian Empire and Austrian national: in other words, as I understand it, although it is true that nationality cannot in strictness be predicated of a corporation, except as Lord Parker said in *Daimler Co.* v. *Continental Tyre and Rubber Co.* (1), by a figure of speech, still so far as nationality could be predicated at all of a corporation, the bank was a Czecho-Slovakian national. It is obvious that questions of some difficulty may have arisen as to what individuals in particular should or should not be recognized as Czecho-Slovakian nationals, questions which had to be set at rest by legislation of the Czecho-Slovak State. The sort of case that I have in mind is this: The Czecho-Slovak State having arisen out of the independence of a portion of the former Austrian

(1) [1916] 2 A. C. 307, 339.

Empire, Czecho-Slovakian citizens would, no doubt, be those who had some kind of local connection with that portion. In many cases there could be no question at all with regard to a man who had never been outside Prague, but had lived there all his life; nobody would doubt for a moment that he was a Czecho-Slovakian citizen. On the other hand, there might be many difficult cases. Take the case of a man whose commercial interests lay partly in Czecho-Slovakia and partly in Trieste and whose parents might not have been born in Czecho-Slovakia, and perhaps had not lived in Czecho-Slovakia. There might be many cases of that kind as to which there might be some doubt whether the man did in fact, by reason of the setting up of the Czecho-Slovak State, become a Czecho-Slovakian citizen. As regards the vast bulk of Czecho-Slovakian citizens the matter would be pretty plain, although no doubt it has been made plainer by legislation. As regards Czecho-Slovakian companies, in so far as a company can have nationality, I cannot conceive that there could be any doubt that a company which owed its corporate character to the law prevailing in Prague, which had its principal place of business and seat in Prague, would become a national of Czecho-Slovakia. I am prepared to approach this case from the point of view that those representing Czecho-Slovakia or indeed any of the other Powers which were parties to the Treaty, to which I shall have to refer in a moment, came to the negotiation of the Treaty with this fact before them, that there were many persons whose Czecho-Slovakian nationality could not be doubted, although in the case of many others there might be doubts and difficulties, and that in the case of a company in the position of this particular company, as in the case of many individuals, the question of Czecho-Slovakian nationality, or (in the case of a company) quasi-nationality, could not be in doubt.

In July, 1920, the Treaty of Peace came into force. It had been signed at St. Germain-en-Laye on September 10, 1919. It is usually known as the Treaty of St. Germain. The case which is raised by the Administrator of Austrian

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Property to justify him in retaining the property of the bank, which would otherwise be admittedly theirs, is based upon certain provisions in the Treaty which have been embodied in the law of England by an Act worked out by an Order in Council, to which I will refer later. The Treaty of Peace was made between a number of States, which are described as Allied and Associated Powers on the one hand and Austria on the other. Among those Allied Powers is Czecho-Slovakia. The Treaty contains (amongst others) the following recitals: "Whereas the former Austro-Hungarian Monarchy has now ceased to exist, and has been replaced in Austria by a Republican Government And whereas the principal Allied and Associated Powers"—that expression includes the British Empire—"have already recognized that the Czecho-Slovak State, in which are incorporated certain portions of the said Monarchy, is a free, independent and allied State." I pause here to say that that recognition was, so far as this country is concerned, given as early as August, 1918, and, as I gather, it was on or about the day which has been spoken of as the birthday of the Czecho-Slovak State, that Great Britain formally expressed her willingness to receive an accredited representative from the State so recognized. The Treaty goes on: "And whereas it is necessary, while restoring peace, to regulate the situation which has arisen from the dissolution of the said Monarchy and the formation of the said States, and to establish the government of these countries on a firm foundation of justice and equity: For this purpose the High Contracting Parties are represented as follows:" Among the High Contracting Parties represented is the President of the Czecho-Slovak Republic, who was thus one of the parties to the Treaty. The Treaty begins by saying: "From the coming into force of the present Treaty the state of war will terminate. From that moment, and subject to the provisions of the present Treaty, official relations will exist between the Allied and Associated Powers and the Republic of Austria." By Art. 27 of the Treaty the frontiers of the newly recognized Austrian Republic are fixed; and, in part, with reference to the

boundary of the Czecho-Slovak State. Accordingly, a portion of the former Austrian Empire, which admittedly included Prague, is recognized as being cut off from the former Austrian Empire and treated as territory de jure, as it had for about a year before been treated as territory de facto of the Czecho-Slovak State. By Art. 53, Austria, in conformity with the action already taken by the Allied and Associated Powers, recognized the complete independence of the Czecho-Slovak State, including certain territory which I need not mention. Let me pause here to see what the effect of that is. It is that, while previous to the coming into force of the Treaty there had been de facto the State of Czecho-Slovakia with de facto Czecho-Slovak nationals, both individuals and (in the sense in which I have explained) corporations and companies, Austria recognizes that that de facto position is clothed with the sanction of law and recognizes by this Treaty that from and after the coming into existence of this Treaty, those Czecho-Slovakian nationals are for all purposes and in relation to all the world (including Austria, which could historically have made a claim to the contrary) Czecho-Slovakian nationals. Then comes a catena of clauses under the heading Section VI. relating to Nationality. Art. 70 provides: "Every person possessing rights of citizenship (pertinenza) in territory which formed part of the territories of the former Austro-Hungarian Monarchy shall obtain ipso facto to the exclusion of Austrian nationality the nationality of the State exercising sovereignty over such territory." Something has been said as to the meaning of the word "citizenship." It is suggested that no person can within the meaning of this Article possess rights of citizenship, unless he be an individual. My attention was drawn to a statute of the Austrian Government in the year 1863 or 1865, which deals with conditions under which individuals can qualify themselves or become qualified for possession of rights of citizenship. It was suggested that I must take it that according to the law of Austria, and, as it was suggested, according to the law of Czecho-Slovakia, citizenship within the meaning of the term as used in Art. 70

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could belong only to individuals. I will only say at this moment that I am bound, I think, to construe the expression "citizenship" as best I can from my knowledge of the English language. I do not see why the term "citizenship" there should not be construed as the exact equivalent of the expression "civil rights." That the expression "civil rights" in the codes in force in various parts of Europe is held to be equivalent to citizenship is, I believe, the fact; but I do not lay undue stress on that. I construe "citizenship" as an English expression, and feel satisfied that I am at liberty and, indeed, bound to give it a meaning which, for any purpose with which I am concerned in this case, is indistinguishable from "civil rights." Reading "citizenship" in that sense, I do not see why the expression "every person possessing rights of citizenship" in a particular territory should not include a corporation operating in that territory, with its principal place of business in that territory, and tracing its position as a legal entity to the law in force in that particular territory. That Article is followed by several Articles which deal, no doubt, with cases of individuals and make specific provision in regard to various circumstances in which an individual might find himself. Art. 75, which directly mentions juridical persons as opposed to physical persons or individuals as such, says: "Juridical persons established in the territories transferred to Italy shall be considered Italian, if they are recognized as such, either by the Italian administrative authorities or by an Italian judicial decision." It was suggested on behalf of the defendant that the presence of that Article supports the argument that Art. 70 deals with individuals only. The argument was that, when the Treaty seeks to deal with corporations, it does so expressly, and that in this catena of clauses it deals only with those juridical persons expressly mentioned in Art. 75. On the other hand, it was argued for the plaintiffs that the presence here of a special clause, dealing with a special class of juridical persons, would rather point to the view that these clauses are intended to deal with both individuals and juridical persons. In my judgment the latter argument is the sounder one; and,

I think, the presence of Art. 75 assists the view that Art. 70 is intended to extend beyond individuals and to deal with juridical persons as well. I need not consider in detail the rest of the Articles which are in Section VI. containing clauses relating to nationality, but I pass on to Art. 230, which is under the head of Part X.: "Economic Clauses, Section I.—Commercial Relations, Chapter IV.: Treatment of Nationals of Allied and Associated Powers." It is in these terms: "Austria undertakes to recognise any new nationality which has been or may be acquired by her nationals under the laws of the Allied and Associated Powers, and in accordance with the decisions of the competent authorities of these Powers pursuant to naturalization laws or under treaty stipulations, and to regard such persons as having, in consequence of the acquisition of such new nationality, in all respects severed their allegiance to their country of origin." I do not think I need dwell on that Article, for I do not think that, for any purpose with which I am here directly concerned, it carries much further the provisions of Art. 53, by which Austria had already recognized the complete independence of the Czecho-Slovakian State, thereby necessarily recognizing the independence of Czecho-Slovak nationals.

I pass on to Art. 249. That is the Article upon the provisions of which the contention in this case mainly turns. That Article provides that "the question of private property, rights and interests in an enemy country shall be settled according to the principles laid down in this Section and to the provisions of the Annex hereto." That would seem prima facie to connote that the provisions of this Article are aimed at regulating the rights between the belligerent Powers on the one side and those who are their enemies on the other, and I only pause to point out that the plaintiffs in this action had ceased to be enemies of Great Britain from, at the latest, October, 1918. Sub-clause (*b*) is as follows: [His Lordship then read the first paragraph of Art. 249 (*b*) and continued:] If I may translate that into terms of Great Britain and Czecho-Slovakia, as being the

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Powers mainly concerned with what I am dealing with here, it would run in this way : " Great Britain and Czecho-Slovakia reserve the right to retain and liquidate all the properties belonging, at the date of the coming into force of the present Treaty, to nationals of the former Austrian Empire within the territory of Great Britain and the territory of Czecho-Slovakia." I pass over some lines which are not material for the present purpose and come to this paragraph : " Persons who within six months of the coming into force of the present Treaty show that they have acquired ipso facto in accordance with its provisions the nationality of an Allied or Associated Power "—for the purposes of this case the nationality of Czecho-Slovakia—" including those who under Arts. 72 or 76 obtain such nationality with the consent of the competent authorities, or who under Arts. 74 or 77 acquire such nationality by virtue of previous rights of citizenship (pertinenza) will not be considered as nationals of the former Austrian Empire within the meaning of this paragraph."

One contention on the part of the plaintiff is, as I understand it, that sub-clause (*b*) of Art. 249 has no relation at all to any one except persons who are nationals of the Austrian Republic set up in Austria on the ruins of the Austrian Empire by this Treaty. This Article has, however, been the subject of a decision by Eve J. in the case of *Rothschild* v. *Administrator of Austrian Property* (1), and he was not prepared to take that view. His decision in that regard binds me, and I follow it. The question to be determined in that case was not an easy one, owing to the fact that there is a strange discrepancy between the French version of the Treaty in this part of the Article and the English version. But I need not pursue that. The point was made by the plaintiff in this case, and it will be open to him to pursue it in another Court should he wish to do so, but so far as I am concerned the matter is decided, and I am not at liberty to construe the expression " nationals of the former Austrian Empire " as confined to nationals of the new Austrian Republic. The position therefore is this, that the first part

(1) [1923] 2 Ch. 542.

of the Article which I have read gives to Great Britain and Czecho-Slovakia the right to retain the property, rights and interests of, amongst others, Czecho-Slovak citizens, who were nationals of the former Austrian Empire; but subject to this proviso, that persons who have acquired ipso facto, in accordance with the provisions of the Treaty, Czecho-Slovakian nationality are excluded from the class of persons whose property, rights and interests may be retained under the preceding provision. I discard the words which refer to the necessity of showing acquisition of nationality within six months, because no point is raised about that in this case, the defendant being prepared to assume that all proper notices and information within such time, if any, as was limited by the Treaty, were given and furnished to the proper authority. So all that I have to consider is whether the plaintiffs are right in saying that within the meaning of the Treaty they have acquired ipso facto Czecho-Slovakian nationality.

Before passing from Art. 249, I ought to mention that by sub-clause (*j*) "Austria undertakes to compensate her nationals in respect of the sale or retention of their property, rights or interests in Allied and Associated States." It was suggested by the Solicitor-General on behalf of the defendant that the effect of that clause is that, if the contention of the defendant is right—namely, that Great Britain has the right to retain and liquidate the property now in question—there will under that provision be a right of recourse by the plaintiffs against the present Republic of Austria. It is however by no means clear that the expression "her nationals" in clause (*j*) refers to any nationals but those of the new Republic of Austria, and I am not by any means clear that there is or would be any such right of recourse as is suggested.

I ought to point out that upon the construction of this Treaty contended for by the defendant, Czecho-Slovakia has by the Treaty reserved the right to retain and liquidate the property of Czecho-Slovakian companies and corporations for the purposes mentioned in the Treaty, and whether such

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corporations would have a right of recourse against the present Republic of Austria is a question which turns on sub-clause (*j*). The object of retaining and liquidating property under this Article is, of course, in order to use the proceeds to liquidate what may generally be spoken of as war obligations of enemy States, or obligations of enemies. I will not go into the rather complicated details of the purposes for which the proceeds of liquidation may be used; it is enough to say that this Article, in so far as it operates, deprives of their property those whose property is liable to the charge, leaving them in some cases, at any rate, rights of recourse against Austria.

There are one or two more Articles which I ought not to pass over, though, having regard to the course the argument took, some of the Articles are no longer of the importance that they seemed at one stage to have. Art. 263, under Section VIII., "Special provisions relating to transferred territory," is in these terms: "Of the individuals and juridical persons previously nationals of the former Austrian Empire, including Bosnia-Herzegovinians, those who acquire ipso facto under the present Treaty the nationality of an Allied or Associated Power are designated in the provisions which follow by the expression 'nationals of the former Austrian Empire'; the remainder are designated by the expression 'Austrian nationals.'"

The importance of that section is that it, first of all, recognizes the fact that juridical persons may come within the expression "nationals" as used in the Treaty. But I need not dwell long upon that, because I think it is common ground between those who have argued this case on each side that, whatever may be the technical difficulties in strict legal language of applying the expression "nationality" to corporate bodies, the expression nationals, where it is used in this Treaty, in all cases may include, and in many cases does include, corporate bodies, although, as Lord Parker said in the passage I have already mentioned, in regard to corporate bodies, the expression "nationality" can be used only by a figure of speech. But it is for another purpose

that that Article seems to me to be of importance. As I read it, it implies that both individuals and juridical persons are persons who may acquire ipso facto nationality under the present Treaty. That becomes material when I come to consider the arguments put forward on behalf of the defendant, that no one can acquire nationality ipso facto under this Treaty, if he is not an individual.

Art. 272 is as follows: "Insurance companies whose principal place of business was in territory which previously formed part of the former Austro-Hungarian Monarchy shall have the right to carry on their business in Austrian territory for a period of ten years from the coming into force of the present Treaty, without the rights which they previously enjoyed being affected in any way by the change of nationality." That Article again was referred to upon the question whether this Treaty recognized nationality in the sense in which the term is used in the Treaty as being a characteristic of corporate bodies. So much for the Treaty. Let me state next how and in what sense the Treaty became part of the law of England.

An Act was passed on April 27, 1920 (Treaties of Peace (Austria and Bulgaria) Act, 1920), under which His Majesty was authorized to make such Orders in Council as might appear to him to be necessary for carrying out the Treaties and for giving effect to any of the provisions of the Treaties. An Order in Council was issued by His Majesty on August 13, 1920. It has, however, been modified in some respects by subsequent Orders. The relevant parts of that Order are in these terms: "The sections of the Treaty set out in the Schedule to this Order shall have full force and effect as law." Then sub-clause (ix.) says: "All property, rights and interests within His Majesty's Dominions or Protectorates belonging to nationals of the former Austrian Empire at the date when the Treaty comes into force" are charged with the payment of certain sums. I need not trouble with the details. The provision is made in exercise of the right reserved by the Treaty to retain and liquidate certain property, and is made with the object of carrying out the

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provisions of the Treaty in regard to such property. There is a definition clause in clause 2 of the Order, which provides: "For the purposes of the foregoing provisions of this Order, but not including the Schedule therein referred to.". . . . "The expression 'nationals' in relation to any State includes the Sovereign or former Sovereign and the subjects or citizens of that State and any company or corporation incorporated therein according to the law of that State and in the case of a Protectorate the natives thereof. The expression 'nationals of the former Austrian Empire' does not include persons who within six months of the coming into force of the Treaty show to the satisfaction of the Administrator that they have acquired ipso facto in accordance with its provisions nationality of an Allied or Associated Power." The section goes on: "The Interpretation Act, 1889, applies for the interpretation of this Order in like manner as it applies for the interpretation of an Act of Parliament, and as if this Order were an Act of Parliament." I need not refer to the words of the Interpretation Act; it is enough to say that, unless a contrary meaning appears, the expression "persons" in the Order includes companies. Then in the Schedule to the Order appears, among other portions of the Treaty, Art. 249, to which reference has already been made.

Before passing from the Order I should say that it appears to me on reading that definition clause that the Order proceeds upon the footing that the expression in the Treaty, "nationals of the former Austrian Empire," that is to say, the class of persons whose property Great Britain reserves the right to retain and liquidate, includes companies, except those which have acquired Czecho-Slovakian nationality ipso facto in accordance with the provisions of the Treaty. I have then, as it seems to me, this guide before me in considering Art. 249 of the Treaty, that in the view of Great Britain and of His Majesty as a signatory of the Treaty and as the authority that issued the Order in Council, where the Treaty used the expression "persons who have acquired Czecho-Slovakian nationality ipso facto in accordance with

the provisions of the Treaty," the Treaty means to include companies among those persons.

The argument put forward by the plaintiffs is this. They say: "We have within the meaning of the Treaty acquired Czecho-Slovakian nationality ipso facto in accordance with the provisions of the Treaty." The defendant says: "Nobody can acquire nationality ipso facto in accordance with the provisions of the Treaty except individuals." My first comment upon this is that that does not appear to be the view taken by one signatory of the Treaty—namely, Great Britain—as appears from the terms of the Order in Council. That leads me to suspect that there may be something wrong with the view so put forward. But I quite agree that before I can decide in favour of the plaintiffs I must find that, somehow or other, they are persons who can be aptly described as having acquired nationality ipso facto in accordance with the provisions of the Treaty.

The defendant's argument is that nobody can acquire Czecho-Slovakian nationality ipso facto in accordance with the provisions of the Treaty, unless some clause can be found in the Treaty which so enacts. It is said that Art. 70 of the Treaty does not do so, because that Article deals only with individuals and cannot apply to companies, and that there is no other provision in the Treaty which can be relied upon. I have first to consider whether the defendant makes good that point. I have already, as I travelled through the Treaty, pointed out why, in my opinion, it is by no means clear that Art. 70 applies to individuals only. I have indicated the reasons which lead me to think that I am justified in construing the expression "citizenship" in that Article as implying the possession of civil rights, and that I am entitled to treat a company which possesses civil rights in Prague as a person who within Art. 70 obtains Czecho-Slovakian nationality ipso facto. If I am right in that, the contention of the defendant fails at once, and the plaintiffs succeed. I recognize, however, that there may be some difference of opinion on that point, and I proceed to consider whether, assuming that I am wrong in that and that I am bound to

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treat the expression "citizenship" as a technical expression applicable only to individuals, I can find any other Article in the Treaty in which a Czecho-Slovakian company is regarded as or treated as acquiring Czecho-Slovakian citizenship ipso facto in accordance with the provisions of the Treaty.

Sir Patrick Hastings has contended, with much force, that such a provision is to be found in Art. 53. He says that, until the coming into force of the Treaty, Czecho-Slovakian individuals and Czecho-Slovakian companies enjoyed Czecho-Slovakian nationality de facto. But the operation of the Treaty was to change their de facto nationality into actual de jure nationality recognized by all the signatories to the Treaty, and in particular by Austria, the State which represented in some senses the former Austrian Empire of which they had previously been nationals. With that view I am in agreement. I think the argument so put forward is a sound one, and that the effect of Art. 53 is to make those who have been Czecho-Slovakian nationals de facto Czecho-Slovakian nationals de jure, and, accordingly, that it can be predicated of them that they have acquired Czecho-Slovakian nationality ipso facto in accordance with the provisions of the Treaty.

The expression "ipso facto" has given rise to some argument before me. It corresponds with the expression in the French version of the Treaty "de plein droit," and would seem to refer to the case of persons who, without taking any step of their own or fulfilling any formality, by force of some external fact obtain a nationality; but whether it is by the coming into force of the Treaty or by the setting up of Czecho-Slovakia as a State may be a question. But if I am right in thinking that "ipso facto" means through some process which involves no formality or act on the part of the person who so acquires nationality, it appears to me that I am safe in holding that by reason of what had occurred—namely, the setting up of the Czecho-Slovakian State, coupled with the coming into force of the Treaty—the effect of Art. 53 is to make those who have previously been Czecho-Slovakian citizens

de facto (although not in the fullest sense de jure) ipso facto Czecho-Slovakian nationals.

Further, I think there is a wider ground upon which it would be open to me to hold that the plaintiffs are entitled to succeed. In my view, on the facts which I have stated, when the signatories to the Treaty approached the problem of preparing it, they must be taken to have had before their minds that there were in all the countries with which they were dealing—but I will speak only of Czecho-Slovakia, because that is the only one with which I am concerned—not only individuals but corporate bodies, corporate bodies, I have no doubt, in many cases of great importance and great wealth; because, if the argument on behalf of the defendant is sound, the grievous burden placed upon the bank as a trading corporation would, as I understand, also have to be placed upon any other Czecho-Slovakian corporate body, such as, for instance, a municipal body if, as I have no reason to doubt, they are of a corporate character in Czecho-Slovakia as they are here. I put to the Solicitor-General the instance—although it seems to me an extreme one—of the municipal corporation of Prague itself, assuming that I was right in supposing that it is a corporate body. Instances may be put of many other corporations in Czecho-Slovakia, corporations possibly of a charitable nature, or even of a religious nature. It is to my mind difficult to suppose that the signatories to the Treaty can have failed to be alive to the extraordinary importance of the Treaty to bodies of that class. It was suggested on behalf of the defendant that the case of corporate bodies in Czecho-Slovakia and elsewhere and of their position in regard to this charge upon their property had been overlooked. I feel the greatest difficulty in accepting that view. The view which forces itself upon me is that, on the contrary, it would not have occurred to the signatories to the Treaty that a distinction for the purposes of property could be drawn between individuals of Czecho-Slovakian nationality and collections of individuals incorporated by Czecho-Slovakian law who were as intimately connected with Czecho-Slovakia (although

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corporate bodies) as individuals who were in the fullest possible sense Czecho-Slovakian nationals. I should be much more prepared, in attacking the problem of construing the Treaty, to find that any slight inaccuracy or obscurity arose not from the omission of corporate bodies from the consideration of those who were preparing the Treaty, but from the very fact that it would never occur to them that in the absence of special provision distinctions could be drawn in regard to property between corporate bodies and individuals. Looking at it from that point of view, am I not entitled to ask where in the Treaty do I find that the advantages given to Czecho-Slovakian nationals are to be confined to Czecho-Slovakian nationals, who are individuals, and are to be denied to Czecho-Slovakian nationals who are corporations and who share in nationality in the same way as the individual for all the purposes material to the Treaty? When it is borne in mind that the Articles I have to construe deal with property and that the various systems of law operating in Europe with, so far as I know, no exception, assimilate the position of corporate bodies as regards property as closely as possible to that of individuals, I should expect to find that any general expression of a somewhat obscure character would include rather than exclude corporate bodies.

Turning to Art. 249, with that in mind, I find that the property rights (if I may so express it) of those who have acquired ipso facto Czecho-Slovakian nationality in accordance with the provisions of the Treaty are reserved. I read those words as meaning, apart altogether from the arguments which have been presented, as to the meaning of Arts. 70 and 53, "those who have acquired Czecho-Slovakian nationality, without the execution of any act on their own part, in conformity with the provisions of the Treaty."

Then, when I find in the Treaty that, while provisions have been inserted for making it clear what individuals acquire nationality ipso facto—because in the case of individuals there may be many cases of doubt and difficulty—the insertion of any express provisions providing for nationality in regard to corporate bodies is omitted, this is to be ascribed

not to the intention of depriving them of the advantages that flow from their nationality or quasi-nationality, but to the fact that it must necessarily be only too plain that a corporate body which owes its very existence to the laws of a particular country and which has its principal place of business in that particular country must be treated as a national of that country.

If I am right in supposing that that is the reason why I find no express provision dealing with the ipso facto acquisition by corporations of nationality, then am I not right in saying that ipso facto, without any further formality, by reason of the formation of the Czecho-Slovakian State, by reason of that State having become recognized by the European community of nations—a recognition sealed by this Treaty—the corporate body here in question has become a Czecho-Slovakian, there being nothing in the Treaty to prevent it so becoming ?

I recognize, however, that that last ground trenches upon matter which may be open to controversy, and while throwing that out as the ground upon which the exemption from the charge may be claimed I base my judgment in this case upon, first, the construction of Art. 70, and next, should I be wrong in that, upon the construction of Art. 53 and the rest of the Treaty. I base my judgment, therefore, on the ground that there is an express provision in the Treaty in the way I read it, that Czecho-Slovakian corporations are entitled to the benefit of exemption from the powers to retain and liquidate conferred by Art. 249 of the Treaty.

I only wish to add this. In the course of the argument I suggested a number of consequences to the Solicitor-General which seemed to me to be somewhat absurd consequences, but which would flow from the adoption of the view that he argued, that corporations are not exempt from the liability of having their property retained and liquidated under Art. 249. I did that from this point of view : that, while recognizing that my duty consists in construing this Treaty and that the consequences in one sense have nothing to do with it, still in construing a document of so much

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complication as this and one which bears on the face of it traces of inaccurate drafting, I think I am bound to give consideration to what I must suppose to have been in the minds of those who framed the Treaty. Czecho-Slovakia is an Allied Power and is a party to this Treaty, and I am asked by the defendant to suppose that the representatives of Czecho-Slovakia, while of course preserving the interests in property of such of their own nationals as were individuals who had property outside Czecho-Slovakia, were content that the property of their own companies and corporations should be applied to liquidate the debts of their enemies, and were content to sign a Treaty which actually reserves to the Czecho-Slovakian State itself, as, I read it—and I see no escape from that result upon the construction put upon the Treaty by the Solicitor-General—the right to take the property of its own corporations in its own country, including banks, local authorities, charitable corporations and others, and apply those funds to secure or liquidate the obligations of enemies. In the heat of discussion I think I went so far as to say that that was unthinkable. That expression, perhaps, went too far, but I cannot help feeling that, if there is any reasonably possible interpretation of the Treaty which will avoid attributing to those who represented Czecho-Slovakia—apart altogether from attributing it to those who represented other States—the intention that such a consequence should ensue, I am bound to regard such an interpretation with the greatest favour.

For the reasons I have endeavoured to express this action succeeds, and I make the declaration asked for by the plaintiffs, that they are entitled to the property in question.

Solicitors: *Adler & Perowne; Solicitor to the Clearing Office.*

H. C. H.

In re MONK.

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[1925. M. 2525.]

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Jan. 13, 14;
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Charity—Gift for Loans to poor People of Parish—General Charitable Intention—Possible Surplus—Accumulation—Cy-près.

Considered. *In re* BRADWELL [1952] 1 Ch. 575

The testator, a native of Foxton, a village with a population under 400, bequeathed his residuary estate to charity trustees upon trust to set aside 800*l.* as a "Coal Fund," the income whereof was to be used for the purchase of coal to be distributed among such poor and deserving inhabitants of Foxton as a committee (therein prescribed) should think fit, and to hold the rest of his residuary estate as a "Loans Fund" and to apply the capital and income thereof, under the direction of the committee, "in making loans to poor and deserving inhabitants of the said parish of Foxton in manner hereinafter provided." No loan was to exceed 100*l.*, repayable within nine years at longest. No interest was to be charged, and no borrower to have more than one loan. Only one-sixth part of the Loans Fund was to be lent in any one year, and the borrowers were to be inhabitants or residents of Foxton not above the age of thirty-five years. The testator directed that "all surplus money forming part of or arising from the Loans Fund over and above the sum of 500*l.* and not required for loans shall be invested by the charity trustees under the direction of the committee, but all investments purchased shall be from time to time sold for the purpose of advancing the produce thereof in loans if and when required."

The next of kin contended that there was no prospect of the qualified borrowers exhausting the Loans Fund, and that, in the absence of any general charitable intention and the particular purpose having failed pro tanto, there would be an intestacy in respect of the unrequired surplus:—

Held, that the will displayed a general charitable intention and contained an immediate and effective gift of the whole of the residue to charity, displacing the claim of the next of kin; that the question of accumulation beyond the period allowed by law did not arise, the possibility of a surplus hereafter not impairing the validity of the immediate gift to charity; and that the doctrine of cy-près could be at once applied, if necessary, to any surplus income after the period allowed by law for accumulation had expired.

In re Wilson [1913] 1 Ch. 314 distinguished.

Decision of Tomlin J. reversed.

APPEAL by the Attorney-General from a decision of Tomlin J.

The following statement of facts is taken from the considered judgment of the Master of the Rolls:—

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"Robert Monk, the testator, who was the proprietor of the 'Robin Hood' Hotel at Leicester, made his will dated June 10, 1913, and died on August 5, 1916. By his will he gave a life interest in his estate to his widow, and subject thereto he gave certain legacies, and subject to the payment of them and the duties thereon, he left the residue of his estate to be dealt with in the manner that gives rise to the questions to be determined herein. His widow died on May 22, 1924. He was a native of the parish of Foxton, a small parish some three and a half miles distant from Market Harborough, and in his will desired to be buried there. The population of Foxton is under 400. The value of the estate proved was 21,457*l.* Upon the death of his widow legacies were to be paid to the value of over 5000*l.*; but owing to the rise in value of the estate since his death, the amount of the residue is about 20,000*l.*

The question to be decided is whether there was a general charitable intention expressed by the testator as to the whole of this considerable sum, or whether after making what is to be supposed to be adequate provision for the charities particularised by the testator, there is an intestacy as to the surplus to which the next of kin would be entitled. Tomlin J. found the question to be one of difficulty. He declared that the will did not contain any general charitable intention in respect of the surplus of the residuary estate, and held that there was an intestacy of the surplus not required for the payment of the legacies and duties, and making provision for the 'Coal Fund' and 'Loans Fund,' and he directed certain enquiries. From that decision the Attorney-General brings this appeal.

Under the terms of the will the testator appointed certain persons trustees of his property, who were thereafter called 'my original trustees,' and gave directions to them. By clause 7: 'Subject to the payment of the aforesaid legacies and any duties thereon, I direct my original trustees to pay and transfer my residuary trust estate to the parish council of the parish of Foxton if formed at the date of the death of my said wife, but if there shall not be any such parish

council then in existence, then my original trustees shall pay and transfer my residuary trust estate to the Official Trustees of Charitable Funds, which parish council or Official Trustees, as the case may be, are hereinafter referred to as "the Charity Trustees," to be held upon the trusts and for the purposes hereinafter declared and contained.' No parish council has ever been formed for Foxton, hence 'the Charity Trustees' are the official trustees of charitable funds, who were constituted and empowered by s. 51 of the Charitable Trusts Act, 1853 (16 & 17 Vict. c. 137), and by s. 1 of the Charitable Trusts Act, 1925 (15 & 16 Geo. 5, c. 27), and have been made a body corporate.

By clause 10 of the will the charity trustees are to set aside a sum of 800*l.* for the purpose of establishing a 'Coal Fund,' the income to be used for the purchase of coal to be distributed among such poor and deserving inhabitants of Foxton, as a committee, which the testator prescribes, may in their absolute discretion think fit. The charity trustees are to hold all the rest of the residuary estate to an account to be entitled in their books 'The Robert Monk's Foxton Charity Loans Fund,' and they are to apply the capital and income of the fund, under the direction of the same committee as that set up for the Coal Fund, in making loans to poor and deserving inhabitants of the said parish of Foxton in manner hereinafter provided. There follow specific directions, which it is unnecessary to refer to except to notice that no loan is to exceed the sum of 100*l.*; only one-sixth part of the Loans Fund is to be lent in any one year; the borrowers are to be inhabitants or residents of Foxton not above the age of thirty-five years; the period for the repayment of the loan is not to exceed nine years, no interest is to be charged, but no borrower can be granted more than one loan.

It is plain that these limitations narrow the number of possible borrowers in the parish to a small one, and that even if they can do so at present, it would not be possible for the committee in the course of a few years, as matters stand at present, to submit a sufficient number of applicants

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to exhaust the total limit of the advances that can be made in any one year. The testator, however, contemplated that there might be a surplus; and by clause 23 of his will provided that "all surplus money forming part of or arising from the Loans Fund over and above the sum of 500*l.*, and not required for loans, shall be invested by the charity trustees under the direction of the committee . . . . but all investments purchased shall be from time to time sold for the purpose of advancing the produce thereof in loans if and when required."

The appeal was heard on January 13 and 14, 1927.

Sir Douglas Hogg A.-G. and *Dighton Pollock* for the appellant. We submit that there is in this will a general charitable intention. The class of beneficiaries may very largely increase in future, but even if the funds are not exhausted in the way indicated by the will, it is clear that the testator meant the poor to benefit generally. Tomlin J. adopted and followed the decision in *In re Wilson* (1), in which the gift was held to fail, because it was for a particular purpose which it was found impossible to carry out, and there was no paramount general charitable intention which could be inferred. There is no total failure of the particular purpose in the present case; part of the purpose at any rate takes effect. The failure of a particular purpose or mode will not prevent effect being given to a general charitable intention: *Biscoe* v. *Jackson* (2); *Chamberlayne* v. *Brockett.* (3)

The Court will always, if it can, infer a general charitable intention: per Buckley J. in *In re Davis* (4); per Lord Parker in *Bowman* v. *Secular Society, Ld.* (5) Where there was more than an adequate sum for the charitable purposes, the surplus was held to be applicable cy-près: *Attorney-General* v. *Earl of Winchelsea* (6); *In re Connolly* (7); *In re Avenon's Charity* (8); *Attorney-General* v. *Minshull* (9); Tyssen's Law of Charitable Bequests, 2nd ed., pp. 141, 202.

(1) [1913] 1 Ch. 314.
(2) (1887) 35 Ch. D. 460.
(3) (1872) L. R. 8 Ch. 206.
(4) [1902] 1 Ch. 876, 881.
(5) [1917] A. C. 406, 442.
(6) (1791) 3 Bro. C. C. 373.
(7) (1914) 110 L. T. 688.
(8) [1913] 2 Ch. 261.
(9) (1798) 4 Ves. 11.

Under this will the residue is to be handed over bodily to charity trustees, and although meticulous directions relative to the Loans Fund are given, that will not, we submit, prevent the Court from saying that there was a general intent to benefit the poor of Foxton, and that the residue was appropriated out and out to charity.

The direction for accumulation does not come within the Thellusson Act, now repealed and replaced by s. 164 of the Law of Property Act, 1925, which applies only to capital. Here income not required for loans is to be accumulated, but can at any time be applied by the trustees. The direction is purely administrative, and is only to be applied from time to time if and when a surplus may occur. It is not a compulsory accumulation, and there is no obligation to retain as capital the sums invested, which retain their character of income, and it is not such an accumulation as that at which the Thellusson Act aims.

This case falls within the principles of *Attorney-General* v. *Bishop of Chester* (1); *Incorporated Society* v. *Price* (2); *Attorney-General* v. *Oglander* (3); *Chamberlayne* v. *Brockett* (4); and *Wallis* v. *Solicitor-General for New Zealand.* (5)

Gavin Simonds K.C. and *C. A. J. Bonner* for the next of kin and heir at law. There is no such overriding charitable intention in this will as, after satisfying the specific charitable purposes, will prevent the residue from being undisposed of. The whole reasoning of Parker J. in *In re Wilson* (6) was directed to the question whether or no there was a general charitable purpose, and he instanced the different classes of case into one or other of which, according to the construction of the will, the gift would fall. There is no paramount intention in this will to give the residue for a general rather than a particular object or charity, and there can be no difference in principle where a particular gift fails wholly or partially. A distinction has always been taken where income has increased and there has been a cy-près application,

(1) (1785) 1 Bro. C. C. 444.
(2) (1844) 1 J. & Lat. 498.
(3) (1790) 3 Bro. C. C. 166.
(4) L. R. 8 Ch. 206.
(5) [1903] A. C. 173.
(6) [1913] 1 Ch. 314.

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and a case where the income has been too large from the beginning. We submit that this will contains no indication upon which the Court can say that this testator meant to benefit this parish in any way except in the two well defined objects of a Coal Fund and a Loans Fund.

The first question is whether the particular purpose has failed; if it has, then the question will arise whether there is a general charitable intention. The inquiry ordered by Tomlin J. will show how far the particular purpose will fail, and then as to the surplus, if any, there will be a question of the general charitable intention.

In *In re Packe* (1) the particular purpose failed, but no paramount general charitable intention was found. It was in that case, as here, the obvious intention of the testator to benefit a particular class in a particular way, and if that failed there was no indication that he intended to benefit that class in any other way. So, in *In re Stanford* (2), where a surplus arose, there was no cy-près application. The distinction between those cases and the present is very fine. There is no room for the application of the cy-près doctrine, where the bequest is in its inception more than sufficient for the particular purpose. It cannot be applied for any other purpose: *Corbyn* v. *French.* (3) There is no difference in this respect between a specific legacy and a gift of residue.

The testator dealt with this Loans Fund in more minute detail than appeared in *Biscoe* v. *Jackson* (4), for if there was any surplus it was to be invested and applied again to the same purpose, and that leaves no room for the suggestion that any other or any general charity was to benefit. In *In re White's Trusts* (5) the particular object failed, but there was no cy-près application, and in *In re Buck* (6) the gift took effect, but not being required for the purposes of the Friendly Society it was held to be applicable cy-près. *Wallis* v. *Solicitor-General for New Zealand* (7) proceeded on

(1) [1918] 1 Ch. 437.
(2) [1924] 1 Ch. 73.
(3) (1799) 4 Ves. 418, 431.
(4) 35 Ch. D. 460.
(5) (1886) 33 Ch. D. 449.
(6) [1896] 2 Ch. 727.
(7) [1903] A. C. 173.

the footing that the documents showed a general charitable intention. In *Attorney-General* v. *Bishop of Chester* (1) there was no mention of cy-près, but the fund was ordered into Court to await the event.

Unless the Court holds that there was a general charitable intent which must be carried out cy-près, the rights of the next of kin and heir at law should be protected.

The direction for accumulation is, we submit, clearly bad under the principle of the Thellusson Act. It is clear that during or after the period allowed for accumulation the whole Loans Fund cannot be used, and there will be an intestacy in respect of surplus income.

Rolt K.C., *C. E. Loseby* and *J. P. Stimson* for the respondent trustees of the will. When once there has been a dedication to charity the Thellusson Act does not take effect in favour of the residuary legatee or next of kin, but the Court will direct a scheme cy-près: *Martin* v. *Margham.* (2).

Dighton Pollock in reply.

Cur. adv. vult.

Feb. 2. LORD HANWORTH M.R. [after stating the facts and provisions of the will above set out continued:] It is not questioned that there is a good charitable trust as to so much of the residuary surplus beyond that required for the legacies, duties, and Coal Fund, as it may be thought wise to reserve for the purpose of the Loans Fund, but it is said that so far as can be reasonably anticipated at the present time, there is no prospect that the qualified borrowers in Foxton will become so numerous as to exhaust the resources of the charity trustees: that as to the sum not required according to present anticipations, there is a surplus undisposed of; and that it may be deduced that the gift is for a particular purpose; and there being no paramount and general intention of a charitable purpose as to the whole, the gift fails, pro tanto, with the result that there is an intestacy in respect of this unrequired surplus.

(1) 1 Bro. C. C. 444. (2) (1844) 14 Sim. 230.

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The authority of the judgment of Parker J. in *In re Wilson* (1) is invoked, where he defines broadly two categories into which the cases decided may be divided. The first where "it is possible, taking the will as a whole, to say that, notwithstanding the form of the gift, the paramount intention, according to the true construction of the will, is to give the property in the first instance for a general charitable purpose rather than a particular charitable purpose, and to graft on to the general gift a direction as to the desires or intentions of the testator as to the manner in which the general gift is to be carried into effect." In such cases, even though the precise directions cannot be carried out, the gift for the general charitable purpose will remain, and be perfectly good, and the doctrine of cy-près applied. The other category is, "where, on the true construction of the will, no such paramount general intention can be inferred, and where the gift, being in the form a particular gift,—a gift for a particular purpose—and it being impossible to carry out that particular purpose, the whole gift is held to fail." Parker J. concludes with the statement of his opinion that the question whether a particular case falls within the one or the other of the above categories is simply a question of the construction of the particular instrument. It is contended that the present case falls within the second category. Parker J. in the particular case before him, where the bequest was to provide the salary of a schoolmaster, who was to teach in a school house to be provided aliunde, held that "the whole gift was in the testator's mind dependent upon it being feasible and possible to carry out these particular directions." As those directions could not be carried out, he held that the bequest failed, as he could find no general and paramount charitable intention. He felt that it was not justifiable to infer a general intention from the particular directions, or to disregard the particularity of the gift, and to give effect to a general, as opposed to the particular intention, which latter was the only one expressed. Other illustrations of the second category in the above division were offered, as in *In re White's Trusts* (2), where

(1) [1913] 1 Ch. 314, 320, 321, 324. (2) 33 Ch. D. 449.

the legacy was for a sum for the building of almshouses on a site to be obtained; *In re Packe* (1), where a house in a remote place inconvenient for the purpose was offered to the Poor Clergy Relief Corporation, which they or any like society felt unable to accept; *In re Stanford* (2), where a balance was left of a fund provided to finance the publication of a particular literary work. In these cases the legacy was given clearly in favour of a particular purpose, and in the first three, conditions precedent had to be fulfilled before the purpose to which the legacy was to be devoted could be effective.

Other cases were cited to us by the Attorney-General: *Incorporated Society* v. *Price* (3), where a rent-charge was given to the support of a school, which after continuing over eighty years was discontinued; *In re Davis* (4), in which a legacy was given to the Home for the Homeless, which did not exist; *Biscoe* v. *Jackson* (5), in which a sum was given to establish a soup kitchen and cottage hospital for a particular parish where land for it could not be found. In these cases a paramount charitable intention was found to exist, even though the particular form expressed for it ceased, or was discovered to be not practicable as precisely intended.

It has been suggested, and I accept the suggestion, that the best principle on which such distinctions can be logically based is that when the gift can be read as devoting the property to charity and adding a condition subsequent to the gift, then, if the performance of the condition becomes impossible, the gift becomes absolute: whereas if the condition is precedent to the gift, and the condition becomes impossible, the gift fails altogether. If this principle is applied to the present case it is at once seen that the Loans Fund is practicable at the present time, if not in the full measure which the sum available makes possible. This element does not make the gift bad if the paramount intention is found: see *Attorney-General* v.

(1) [1918] 1 Ch. 437.
(2) [1924] 1 Ch. 73.
(3) 1 J. & Lat. 498.
(4) [1902] 1 Ch. 876.
(5) 35 Ch. D. 460.

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Bishop of Chester (1), where a legacy towards establishing a bishop in America was held not void, though none had been appointed. Lord Thurlow said the money must "remain in Court till it shall be seen whether any such appointment shall take place." Lord Macnaghten refers to this case in his judgment in *Wallis* v. *Solicitor-General for New Zealand* (2) with approval, as being a recognized authority. He says (and I agree with Tomlin J. that he is dealing with cases where there is a paramount charitable intention) that "it is well settled that where there is an immediate gift for charitable purposes, the gift is not rendered invalid by the fact that the particular application directed cannot immediately take effect, or will not of necessity take effect within any definite limit of time, and may never take effect at all." He refers to *Chamberlayne* v. *Brockett* (3) before Lord Selborne, who accepts Lord Cottenham's words that where personal estate has been given in perpetuity to charity effectually it is neither more nor less alienable, because there is an indefinite suspense, or abeyance, of its actual application, or of its capability of being applied to the particular use for which it is destined. Another illustration was given in *Attorney-General* v. *Oglander* (4), a gift for widows, when there were no widows at the date of the gift.

The next of kin can only base their claim upon a mistake of quantum as to the Loans Fund in the purpose of the testator; and that was held in *Attorney-General* v. *Earl of Winchelsea* (5) not to be a sufficient ground for upsetting the testator's charitable intention: "Wherever the intention has been to dispose of the whole property to certain purposes, as in the early case of Thetford School and numerous subsequent authorities, the whole has been applied, the intention has been considered as such, and it has been only inferred, that the testator has been mistaken merely as to the quantum": see per Lord Alvanley M.R. (6)

(1) 1 Bro. C. C. 144.
(2) [1903] A. C. 173, 185, 186.
(3) L. R. 8 Ch. 206.
(4) 3 Bro. C. C. 166.
(5) Ibid. 373.
(6) Ibid. 379.

It may prove necessary in some cases, if there is a large increase in value of the sum bequeathed after the testator's death, to invoke the doctrine of cy-près, as in *In re Avenon's Charity* (1), where some land was given in 1580 to trustees, who out of the rents and profits were to make a distribution of small sums, and some bread, to twenty-four poor persons of a parish now included in the metropolitan area, and to pay for a sermon to be preached once a year. The sum which was thus available was 21*l.* in 1833, and had recently reached the amount of 320*l.* The whole fund was held devoted to charity, and a scheme to exhaust the surplus authorized. Where the charity can be started at once there is no reason to defeat the general intention of the testator, because it is prophesied that in time the quantum of his gift will be found too large for its purpose.

Applying these principles to the present case, and remembering that the Court leans in favour of a charitable purpose, there appears to me to be a general intention on the part of the testator to devote this residue to charity. It is to be handed over by the original trustees to those whom he refers to as charity trustees. He establishes two specific funds, the Coal Fund and the Loans Fund; the latter, as well as the former, can be immediately utilized for its purpose. He contemplates an excess in the Loans Fund, and directs how that surplus, not at the moment required for loans, is to be dealt with. It is conceivable—if not probable—that all the Loans Fund may be required in a not remote future. It seems impossible to set aside that general intention of charity expressed in the will as to a scheme feasible at the present time. The duly qualified borrowers may present themselves, just as the bishop, or the widows, might have appeared in the cases already cited.

There remains, however, a further and difficult question. The testator died on August 5, 1916. The limit of time, therefore, within which the direction for accumulations can be effective ends on August 5, 1937—that is, ten and a half

(1) [1913] 2 Ch. 261.

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years hence. It is said to be clear that within that limit of time, or, at any rate, when it is reached, the sum appropriated to the Loans Fund cannot be utilized, and thus that there must be an intestacy in respect of such overplus of income beyond that which will be absorbed in making loans from and after that date. It may be so. If the event proves that the prognostications now made are correct, an application might be then made as to such surplus of income, as was indicated as a possibility in *Attorney-General* v. *Earl of Winchelsea.* (1) But in the present case, in my judgment, the question can be solved otherwise. The same point arose in 1844 in *Martin* v. *Margham* (2), where Sir James Wigram V.-C., having decided that there was a paramount intention to devote the whole property, directed his intention to be carried into effect cy-près. In that case the accumulations must have exceeded the legal period; but the Vice-Chancellor stated his opinion that where a testator has expressed his intention that his personal estate shall be in substance applied for charitable purposes, and there is in effect a devotion of it to charitable purposes, the next of kin have no claim at all to his property. The rule is that you are not to look at the event which actually happens for determining the validity of the gift. If the present is to be regarded, there is a charitable bequest good now. If so, are the possibilities that may eventuate ten years hence to have a reflex effect upon the present, and to prevent a declaration now that the gift is valid, even though the application of the cy-près doctrine may come to be invoked hereafter? Turning again to *Chamberlayne* v. *Brockett* (3), the bequest was a sum of 10,000*l.*, with which to build almshouses "so soon as land shall at any time be given for the purpose" of a site for them. Lord Romilly held this gift of the residue void as being a perpetuity. "Suppose," he said, "a testator gave 1000*l.* to be accumulated until some heir of John Jones should select a descendant of A. B. to receive it. That would be void on the ground

(1) 3 Bro. C. C. 373, 380. (2) 14 Sim. 239.
(3) L. R. 8 Ch. 206, 208n., 210.

of perpetuity, because an indefinite period might elapse before the selection was made. So here there is no gift in charity unless and until some person gives land for the purpose of the charity which may not happen for an indefinite period." It was argued for the respondents in the appeal to the Court of Appeal that there was nothing to protect a gift which does not devote the property to charity until the happening of a further event which may be beyond the period allowed by the rule against perpetuities. Lord Selborne and James and Mellish L.JJ. rejected these arguments. Lord Selborne, giving the judgment of the Court, said: "If there was an immediate gift of the whole residue for charitable uses, the authorities mentioned during the argument" (*Attorney-General* v. *Bishop of Chester* (1) and others) "prove that such gift was valid, and that there was no resulting trust for the next of kin of the testatrix, although the particular application of the fund directed by the will would not of necessity take effect within any assignable limit of time, and could never take effect at all except on the occurrence of events in their nature contingent and uncertain. When personal estate is once effectually given to charity it is taken entirely out of the scope of the law of remoteness."

I have already given reasons for my judgment that there is in the present case an immediate and effective gift of the whole of the residue for charity. The next of kin are thus displaced. The purpose can be set in force at once. It would be contrary to the decision just cited, and binding upon this Court, to consider the prospect, uncertain as it is, of how far there may be accumulations, so called, at a time beyond the limit allowed. That would be to contemplate the occurrence of events in their nature contingent and uncertain. Indeed, there being, as I have held, a general charitable intention, the doctrine of cy-près could be at once applied were it necessary so to do. But is there any question at all of accumulation, seeing that there is the possibility that the purpose may exhaust the whole income? In my

(1) 1 Bro. C. C. 444.

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judgment the question of accumulations does not arise. Certainly the possibility of a surplus hereafter does not impair the validity of the gift now for charity.

The appeal must be allowed. The order will be: Discharge the order of Tomlin J., except as to costs; declare that the will discloses a general charitable intention as asked in the notice of appeal; liberty to the Attorney-General to apply for a scheme if and when so advised; stay the action against all defendants except the Attorney-General; costs of the appeal of all parties, as between solicitor and client, out of the fund; plaintiff to retain and pay such costs out of the residuary estate.

SARGANT L.J. For the purpose of deciding the questions raised on this appeal the first and crucial point to be determined is whether the language of the testator's will, in relation to the dispositions made of his residue after the death of his wife, indicates a general charitable intention, coupled with specific directions as to the mode of carrying out that intention, or merely indicates a specific and limited charitable intention, the partial failure of which involves a partial failure of the gift. The indication of a general charitable intention may arise from general prefatory words, such, for instance, as those occcurring in the case of *Wallis* v. *Solicitor-General for New Zealand* (1) or in *Chamberlayne* v. *Brockett.* (2) But, of course, it is not necessary that there should be any such prefatory or separate words, nor have they been present in most of the reported cases where a general charitable intention has been found. The intention may be shown from the nature of the dispositions themselves.

In my judgment there are in the dispositions of this will several definite indications of general charitable intention, which I proceed to point out.

In the first place, immediately after the death of the testator's wife, and the payment of the legacies then given to relatives and friends, there is an abrupt termination of the duties of the testator's original trustees, and a peremptory

(1) [1903] A. C. 173. (2) L. R. 8 Ch. 206, 211.

direction to transfer the whole of the residuary estate to one of two alternative sets of trustees, who are expressly designated "charity trustees." The gift as regards the testator's estate is immediate and absolute. Great importance has always been attached to such a disposition in the many analogous cases in which a share of a testator's estate has been given out and out as regards his estate, and then settled upon trusts for a daughter or child of his, which do not exhaust the entire beneficial interest in the share. In such cases, whether the original absolute gift has been to the daughter herself or to trustees for her, it is quite definitely settled that there is no resulting trust for the next of kin, or ultimate trust for the residuary legatees of the testator, but that the undisposed of beneficial interest passes to the daughter by virtue of the original gift. The principle is stated in *Lassence* v. *Tierney* (1), and has since been expressly restated in *Hancock* v. *Watson.* (2) And amongst the numerous cases to the same or a similar effect *Moryoseph* v. *Moryoseph* (3); *In re Harrison* (4); and *In re Atkinson* (5), may be specially mentioned. The reasoning on which these cases is based is general: see per Younger J. in *In re Harrison* (4), and is, in my view, equally applicable to an original out and out gift to charity trustees, with a superadded direction to apply the subject-matter of the gift to charitable purposes which are not necessarily exhaustive of the whole interest in the fund.

Next it is to be noted that the gift to the charity trustees is immediate and unconditional; that their duties are to begin at once, and are such as will at once absorb some part of the fund, and, indeed, may in the view of the testator ultimately exhaust the whole fund. The case is quite different from that of *In re Wilson* (6), so much relied on by the appellants, where the application of any part of the fund was dependent on the constitution of the whole scheme. If there should be any failure here it would be in the nature

(1) (1849) 1 Mac. & G. 551.
(2) [1902] A. C. 14.
(3) [1920] 2 Ch. 33.
(4) [1918] 2 Ch. 59.
(5) [1925] W. N. 30.
(6) [1913] 1 Ch. 314.

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of a partial failure by matter subsequent, not as there, a total failure through failure of a condition precedent. Counsel for the respondents were not able to cite any case in which, a charity having actually been put into operation and having afterwards proved incapable of exhausting the whole charitable fund, it had then been held that there was a resulting trust for the donor, or in the case of a will for his next of kin.

Further, there is an indication which is perhaps even more cogent than either of those already mentioned. I refer to the provisions in clause 23 of this will for the investment and accumulation of so much of the fund as may not from time to time be required. Here the testator has himself recognized that the fund may be too large for immediate exhaustion, and has provided that in such a case, and without any limit of time, there should be an accumulation with a view to subsequent application for the charitable purposes in question. Reference was made to the restrictions on accumulation imposed by the Thellusson Acts. But it is elementary that these restrictions are quite immaterial for the purpose of placing a construction on the meaning of a will or other document. The document has first to be construed quite independently of those Acts, and they operate, if at all, only after that construction has been ascertained. Here it is the construction of the will, and that only, that is in question ; and for that purpose a direction for indefinite accumulation seems to me of the greatest weight, and does at least completely negative any suggestion that the gift to charity is not intended to be exhaustive, but leaves a possibility of a resulting trust.

It is now well settled, and, indeed, was admitted by counsel for the respondents, that the question of general charitable intent was one depending on the construction of the particular will, or other instrument ; and I have therefore devoted my main attention to the construction of this testator's will without, of course, disregarding any general principles to be deduced from the long bead-roll of cases on the subject. And having come to the conclusion that such an intention is shown by the will, I necessarily think that the appeal here

should be allowed. But I should add that even if this conclusion is wrong, I entertain great doubt whether the judgment of the learned judge can stand. Even if no general charitable intention is shown here, still there is, in my judgment, an effective trust under which the fund, so far as not employed, has to be invested and accumulated for a period not ending till twenty-one years after the testator's death, that is, till August 5, 1937, and under which it would seem that after that date only the income not applied from time to time of the fund would result to the next of kin. And accordingly it seems to me that even on that construction an immediate inquiry such as has been directed is premature.

LAWRENCE L.J. It is plain that the trusts declared by the testator concerning the Loans Fund are intended to continue for ever, and that the persons who may benefit under these trusts are limited in number only by the housing capacity of the parish of Foxton. It is not suggested that the trust so constituted is invalid or incapable of taking effect, but the next of kin assert that the ultimate residue of the testator's estate is larger than is reasonably required for the purposes of the trust, and that the portion not so required ought to be paid over to them. Tomlin J. has so far acceded to the claims of the next of kin as to make an order declaring in substance that after setting aside a sum sufficient for giving effect, so far as practicable, to the testator's express directions relating to the Loans Fund the ultimate residue is undisposed of, and directing an inquiry what is the maximum sum practicable to be employed within a reasonable period of time in giving effect to the directions in the will concerning that fund.

Now it seems to me that the learned judge ought not to have made such an order. In my opinion in a case such as this, where the trust is designed to meet the needs not only of the present, but of all future poor and deserving persons of a certain age inhabiting or residing in the parish of Foxton, it is not for the next of kin, or the Court, to

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determine how much of the testator's estate ought to be devoted to the trust. This seems to me to be a matter which the testator is at liberty to decide for himself. There is nothing in law to prevent a testator, if so minded, from setting up a permanent charity, such as the one here, and from endowing it with a fund sufficiently large to afford relief not only to the present, but also to the future, objects of his bounty. Who can say that the fund provided by the testator is too large to meet all the claims which may in the future be made upon it? What is the reasonable time within which (according to the inquiry directed) the Court ought to find that the whole of the fund would not be required? These are questions upon which, in my opinion, the Court ought not to embark. Nobody can foresee what the population of the parish may be in time to come. It is even conceivable (though possibly not very probable) that the establishment of the Loans Fund (which is to be publicly advertised) may attract persons to the parish. In my opinion the testator is the sole judge of the amount he desires to devote to the object he had in view, and it is not the function of the Court to inquire whether the testator has overestimated the amount required to carry out his scheme, or whether it is likely or not that within a reasonable time so large an amount will be required for that purpose. In order to constitute a partial failure of a charitable trust such as this, the next of kin would, in my opinion, have to prove that it was impossible that the whole sum could ever be required for the purposes of the trust—a fact which, in view of the nature and scope of the trust, is incapable of proof.

There remains, however, to be considered the effect of clause 23 of the will, which directs the charity trustees to invest any surplus money (beyond 500*l.*) forming part of or arising from the Loans Fund, and not required for loans. It was contended on behalf of the Attorney-General that this direction does not amount to a direction to accumulate the income of the Loans Fund within the meaning of s. 164 of the Law of Property Act, 1925 (which replaces the

Thellusson Act), because under the express terms of the clause the investments might at any time be sold and applied for the purposes of the trust. In my opinion this contention is not well founded. The purposes of the trust are limited to the making of loans which are to be repaid, therefore whenever any surplus income is invested there would be an automatic and permanent increase in the fund available for loans. In my opinion the destination of the surplus income after the period allowed by law for the accumulation of income depends primarily upon whether or not there is to be found in this will a general intention to devote the residue to charity. It is not disputed that if there be such a general charitable intention any surplus income after the expiration of the period allowed by law will be applicable cy-près, and will not pass to the next of kin.

I agree with Tomlin J. that the point whether a general charitable intention can be gathered from the testator's will is a difficult one, and I confess to having found it far from easy to make up my mind upon it. On the whole, however, I have come to the conclusion that the better opinion is that the testator has sufficiently indicated his intention to dedicate the whole of the ultimate residue of his estate out and out to charitable purposes—namely, the relief of the deserving poor of the parish of Foxton.

In the first place, it is in my opinion not unimportant to bear in mind that the testator is dealing with the residue of his estate after having made provision for his wife, and given benefits to various relations, and others. It is this residue which the testator directs his original trustees to transfer bodily to either the parish council of Foxton or to the official trustees of charitable funds, whom he designates as the charity trustees, and neither of whom (even if empowered to do so) could ordinarily be expected to entertain the administration of the trusts of any funds not permanently and completely dedicated to charitable purposes.

These facts, coupled with the somewhat general words used by the testator in clause 11 of the will in describing the main purpose of the ultimate trust, and coupled with

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directions contained in clause 23 as to the investment and application of any surplus money not required for making loans, in my opinion afford a strong indication that the whole of the charitable intention of the testator in favour of the deserving poor of the parish of Foxton would not be exhausted if it were found impracticable to apply some part of the capital or income of the ultimate residue in the precise manner laid down by him.

For these, and the other reasons given by the Master of the Rolls and Sargant L.J., I am of opinion that the testator has, in spite of the particularity with which he has laid down the method of application, shown an overriding intention to devote the whole of his residue to charity, and that there is no resulting trust to his estate of any part of the capital or future income of such residue.

I concur in the form of order proposed by the Master of the Rolls.

Solicitor for appellant: *The Treasury Solicitor.*

Solicitors for respondents: *Mackrell, Maton, Godlee & Quincey, for Plummer & Pike, Leicester.*

R. M.

In re EARL OF STAMFORD AND WARRINGTON. RUSSELL J.

1927

May 31;
June 1, 2.

PAYNE *v.* GREY.

[1909. S. 156.]

Settled Land—" Undivided shares vested in possession "—" Tenant for life "—" Persons having the powers of a tenant for life "—" Person entitled to the income of land "—Law of Property Act, 1925 (15 *Geo.* 5, *c.* 20), *s.* 205, *sub-s.* 1 (*xxvi.*); *Sch. I., Part IV., para.* 1; *Sch. I., Part II., paras.* 5, 6 (*c*)—*Settled Land Act*, 1925 (15 *Geo.* 5, *c.* 18), *s.* 20, *sub-s.* 1 (*viii.*); *s.* 23, *sub-s.* 1 (*b*).

Under the will of Lord S., immediately before the coming into operation of the Law of Property Act, 1925, the entirety of his Lancashire estate was limited to trustees for a term of 1000 years, with power to sell or exchange. In the meantime, and subject thereto, H. and G. were each entitled to a life interest in an undivided moiety of the estate. During the existence of the term the trustees were entitled to the rents and profits of the estate, which were to be applied in paying off incumbrances:—

Held, that para. 1 of Part IV. of the First Schedule to the Law of Property Act, 1925, applied to land held in undivided shares vested in possession only when two elements were present—namely, the absence of any antecedent freehold estate, and present immediate beneficial enjoyment by possession, physical or notional, and therefore did not apply to this case; that H. and G. were not "a person entitled to the income of 'land'" who had the powers of a tenant for life under s. 20, sub-s. 1 (viii.), of the Settled Land Act, 1925, because, undivided shares in land being excluded from the definition of "land" in that Act, it was impossible for two undivided moieties of land to constitute "land" within the section; and that, as the entirety of the estate was settled by the will, and there was no tenant for life, or person having the powers of a tenant for life, the trustees of the will had the powers of a tenant for life, and the fee simple was vested in them under paras. 5 and 6 (*c*) of Part II. of the First Schedule of the Law of Property Act, 1925, and s. 23, sub-s. 1 (*b*), of the Settled Land Act, 1925.

Held, also, that the powers of sale and exchange and other powers given to the trustees by the will remained exercisable by them.

ADJOURNED SUMMONS.

The limitations of the Lancashire estate on December 31, 1925, that is to say, immediately before the coming into operation of the Law of Property Act, 1925, were shortly as follows (for detailed statement see [1925] Ch. 162): The entirety of the Lancashire estate was in trustees for a term

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of 1000 years, and on the expiration of that term, and in the meantime, subject thereto, Mrs. Grey was entitled to one half of the Lancashire estate for her life, with remainder to Mrs. Hoare for her life, with remainder to Mrs. Bateson for her life, with remainder to her son as tenant in tail, with remainders over. Mrs. Grey died on October 31, 1926. To the other half Sir John Grey was entitled for his life with remainder to his daughter, Eileen Grey, tenant in tail, with remainder over. Sir John Grey was not tenant for life under the will of Lord Stamford; he had been tenant in tail under that will, but in the year 1914, he had disentailed and executed a resettlement, and his life estate and the remainder over arose under that resettlement. So long as the 1000 years term existed, the rents and profits of each moiety of the estate did not go to the tenant for life, but to the trustees for the purpose of paying off debts. The 1000 years term was still in full force. The life estates were legal limitations. The principal question for determination on the summons was: What became of the fee simple in the entirety of the Lancashire estate on the dawn of New Year's Day, 1926? The summons asked: "Whether the fee simple of the above mentioned Lancashire estate is now vested in the applicants," who are the trustees of the will, "as the statutory owners by virtue of paras. 5 and 6 (*c*) of Part II. of the First Schedule to the Law of Property Act, 1925, and s. 23, sub-s. 1 (*b*), of the Settled Land Act, 1925, or is vested in them upon the statutory trusts under para. 1 (3.) of Part IV. of the First Schedule of the Law of Property Act, 1925, or how otherwise the same is vested," and in either case, whether the power of sale and exchange and other powers given to them by the will would remain exercisable by them.

G. B. Hurst K.C. and *A. L. Ellis* for the trustees of the will. Part IV. of the First Schedule to the Law of Property Act, 1925, does not apply, because the words "vested in possession" govern the whole of para. 1 and mean shares so vested that the owner is entitled either to the physical possession of the land, or to its notional possession by the

receipt of the rents and profits. Here there are no tenants for life and no persons having the powers of a tenant for life. Therefore the trustees have the powers of a tenant for life and the fee simple is vested in them under Sch. I., Part II., paras. 5 and 6 (*c*), of the Law of Property Act, 1925, and s. 23, sub-s. 1 (*b*), of the Settled Land Act, 1925.

Jenkins K.C. and *H. T. Methold* for the son of Mrs. Bateson. Part IV. does not apply to this case. Two persons entitled in undivided shares, and therefore tenants in common, do not come within s. 19, sub-s. 2, of the Settled Land Act, and do not constitute "a person entitled to the income of land" within s. 20, sub-s. 1 (viii.). An undivided share in land is excluded from the definition of "land" in the Settled Land Act, 1925, and therefore two undivided shares when put together do not constitute "land." Under the settlement, the will in this case, there is no tenant for life, or tenants for life, nor a person having by virtue of this Act the powers of a tenant for life within s. 23, and therefore the trustees have the powers of a tenant for life.

P. M. Walters for Mrs. Bateson.

Preston K.C. and *G. R. B. Whitehead* for Sir John Grey, entitled on the expiration of the term to a life interest in an undivided moiety. Part IV. applies. "Shares vested in possession" mean shares so vested that the seisin is in the owner of the shares, there being no antecedent freehold estate. That is true of Sir John Grey's position. When the Law of Property Act, 1925, came into force he was in possession of an undivided share under a compound settlement—namely, the resettlement and the will. Therefore the Lancashire estate was not held under one and the same settlement within Part IV., para. 1 (3.), and the entirety of the land vests in the Public Trustee under Part IV., para. 1 (4.).

If Part IV. does not apply, then although Sir John is not tenant for life within s. 19 of the Settled Land Act, 1925, yet Sir John and Mrs. Hoare have the powers of a tenant for life (so decided by Warrington J. in 1905; see *In re Earl of Stamford and Warrington* (1)) under s. 20, sub-s. 1 (viii.),

(1) [1925] Ch. 162, 166.

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because their estate is in possession, as opposed to in reversion or in remainder. They come within that section if, by the Interpretation Act, "person" is read as including persons. Accordingly the case falls within the Law of Property Act, 1925, Sch. I., Part II., paras. 3, 5, 6 (*c*). Sir John Grey and Mrs. Hoare are the tenants for life within para. 6 (*c*), because by s. 205, sub-s. 1 (xxvi.), tenant for life has the same meaning as in the Settled Land Act, 1925, where it is defined in s. 117, sub-s. 1 (xxviii.), as including a person who has the powers of a tenant for life under this Act, and also (where the context requires) one of two or more persons who together constitute the tenant for life, or have the powers of a tenant for life. Therefore the entirety of the estate is vested in Sir John Grey and Mrs. Hoare.

Bennett K.C. and *G. G. Solomon* for Mrs. Hoare. Part IV. of the First Schedule to the Law of Property Act does not apply. For Part IV. to apply on December 31, 1925, the land must have been held by some persons in undivided shares vested in possession. Sir John Grey and Mrs. Hoare were not in that position, but they were persons entitled to the income of land subject to a trust for accumulation and therefore had the powers of a tenant for life. In s. 20, sub-s. 1 (viii.), of the Settled Land Act "person" includes persons, and the case falls within the Law of Property Act, 1925, Sch. I., Part II., paras. 3, 5, 6 (*c*). Sir John Grey and Mrs. Hoare are the tenants for life and the entirety of the estate is vested in them.

RUSSELL J. This summons raises a question as to the position under the new legislation of the Lancashire estates devised by the will of Lord Stamford. I spent some hours wandering, accompanied by counsel, through this legislative jungle in which apparently it is impossible to form a safe opinion about the meaning of any section in one Act without referring to the sections and the schedules of all the accompanying Acts, and, I need hardly say that in the conclusion at which I have ultimately arrived I do not feel any real sense of security.

I will first consider the position as regards Part IV. of the First Schedule to the Law of Property Act, 1925. One side says that Part IV. does not apply because the words at the beginning of para. 1 of Part IV., which words govern the whole of para. 1, run thus: "Where immediately before the commencement of this Act, land is held at law or in equity in undivided shares vested in possession, the following provisions shall have effect," and they say that "shares vested in possession" means shares vested in such circumstances that the owner is entitled to either the physical possession of the land, or notional possession by receipt of the rents and profits of the land; and they say that is not true of the present persons who may be described as tenants for life. On the other hand the other side say that the words "shares vested in possession" mean shares vested in such circumstances that the seisin is in the owner of the shares, there being no antecedent freehold estate. That is undoubtedly true with regard to the position of the present tenants for life.

It seems to me the true question to be considered is this: Do the words in para. 1 refer only to the latter set of circumstances, or do they refer to both sets of circumstances; must you have both sets of circumstances co-existing in order to bring para. 1 into operation? Normally, of course, the two conditions would co-exist in every case. That they do not do so in this particular case is due to the exceptional provisions of this particular will. Para. 2 is merely the antithesis of para. 1, and whatever "possession" means in para. 1, it bears the same meaning in para. 2. In the definition clause, "possession" is defined as including the receipt of rents and profits. It seems to me, therefore, that I must read para. 1 as including and referring to possession by the receipt of rents and profits as opposed to physical possession. It also, of course, no doubt refers to possession as opposed to "in reversion" and "in remainder"; but, in my opinion, para. 1 refers to a condition of affairs where both elements are present—namely, first the absence of any antecedent freehold estate, and secondly present immediate beneficial

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enjoyment by possession physical or notional; and accordingly in my opinion Part IV. does not apply to the present case.

The case not being within Part IV. it is not necessary for me to decide under which provisions of Part IV. it would fall if the case did fall within Part IV.; but in case this matter goes higher I will state what my view is. The case is clearly not within sub-para. 1 of para. 1 of Part IV., nor within sub-para. 2 of para. 1; nor is the case, in my opinion, within sub-para. 3, the land here not being held under one and the same settlement. The necessary result would be that if Part IV. applied, what I venture to call the residuary provision in Part IV., namely, that indicated in sub-para. 4 of para. 1 of Part IV., would be the one that applied.

If Part IV. does not apply, then two rival claims were set up. The persons who are each entitled on the expiration of the term to a life interest in an undivided moiety (whom I may call, without prejudice, "life tenants") say that although they are not tenants for life under s. 19 of the Settled Land Act, 1925, they are persons having the powers of a life tenant under s. 20, sub-s. 1 (viii.), because their estate or interest is in possession (that is as distinct from in reversion or in remainder), and they are within the words of the section if, by means of the Interpretation Act, the singular is read as including the plural. That being so they say the case falls within the Law of Property Act, 1925, Sch. I., Part II., paras. 3, 5 and 6 (*c*). Para. 3 provides: "Where immediately after the commencement of this Act any person is entitled, subject or not to the payment of the costs of tracing the title and of conveyance, to require any legal estate (not vested in trustees for sale) to be conveyed to or otherwise vested in him, such legal estate shall, by virtue of this Part of this Schedule, vest in manner hereinafter provided." Under para. 5: "For the purposes of this Part of this Schedule, a tenant for life, statutory owner or personal representative, shall be deemed to be entitled to require to be vested in him any legal estate in settled land (whether or not vested in the Crown) which he is, by the

Settled Land Act, 1925, given power to convey." Para. 6 runs as follows: "Under the provisions of this part of this Schedule, the legal estate affected (namely, any estate which a person is entitled to require to be vested in him as aforesaid) shall vest as follows: . . . . (*c*) Where at the commencement of this Act or by virtue of any statute coming into operation at the same time the land is settled land, the legal estate affected shall vest in the tenant for life or statutory owner entitled under the Settled Land Act, 1925, to require a vesting deed to be executed in his favour." They say they are the tenant for life within para. 6 (*c*) because by s. 205, sub-s. 1 (xxvi.), the expression "tenant for life" has the same meaning as it has in the Settled Land Act, 1925, and by s. 117, sub-s. 1 (xxviii.), "tenant for life" includes a person "who has the powers of a tenant for life under this Act and also (where the context requires) one of two or more persons who together constitute the tenant for life or have the powers of a tenant for life." Therefore they say, the legal estate of the entirety is vested in them. The flaw in this argument is that these two persons are not persons having the powers of a tenant for life under the Settled Land Act, 1925. Upon the old authorities they would, I think, have been such persons under the old Settled Land Act, but in that Act "land" expressly included an undivided share in land, whereas "land" in the new Act does not include an undivided share in land. Bearing this in mind and turning to s. 20, sub-s. 1 (viii.), of the Settled Land Act, 1925, these life tenants do not fit that provision. If you read in the plural, by virtue of the Interpretation Act, the section would run "persons entitled to the income of land under a trust or direction for payment thereof to them during their own lives," but there is no such direction in the present case. There is a direction to pay the income of one undivided moiety of the land to Mrs. Hoare for her life, and, on the assumption that you may treat for this purpose Sir John Grey as life tenant of the other moiety under the will, which he is not, there is a direction to pay the income of the other undivided moiety to him for life. You cannot, in my opinion, satisfy

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the word "land" in the section by producing and adding together two undivided moieties of land, when undivided shares of land are, in terms, excluded from the definition of "land" in the Settled Land Act, 1925.

There remains the contention of the trustees, which I think is the correct one—namely, that this is the case of a settlement, the entirety being settled under the will, where, as is admitted, there is no tenant for life, and, as I have held, no persons having by virtue of the Settled Land Act, 1925, the powers of a tenant for life. That being so, the trustees of the will have the powers of a tenant for life. Accordingly, by virtue of paras. 5 and 6 (*c*) of Part II. of Sch. I. of the Law of Property Act, 1925, and s. 23, sub-s. 1 (*b*), of the Settled Land Act, 1925, the fee simple of the Lancashire estates is now vested in the applicants, and I answer the question in the summons in the terms of its first alternative. The power of sale and exchange, and other powers given to the trustees by the will of Lord Stamford will remain exercisable by them and will operate as an additional statutory power.

Solicitors: *Bower, Cotton & Bower; Maples, Teesdale & Co., for Lord & Parker, Worcester; Peake, Bird, Collins & Co.; Smith, Fawdon & Low, for Wright, Woodrow & Aysom, Leicester.*

J. B. B. M.

TORBAY HOTEL, LIMITED *v.* JENKINS AND LAWLEY.

CLAUSON J.

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March 3, 4, 8, 29.

[1926. T. 448.]

Covenant—Restrictive Covenants—Scheme of mutual Obligations established by common Intention—Rights of Purchasers inter se—Area of mutual Obligations undefined—Burdens running with Land—Tenement already alienated by vendor Covenantee.

The plaintiffs and the first defendant were owners of adjoining pieces of land forming parts of the Cary Estate, which comprised a considerable part of Torquay and a neighbouring area to a large extent unbuilt upon. The second defendant was the lessee of the first defendant. In the earlier stages of the estate's development it was the practice to grant leases which contained more or less uniform covenants of a familiar type as to the user of the land leased. About the year 1890 the owners adopted a new policy and, as leases dropped in, or as lessees were desirous of becoming purchasers, the fee simple of the land was conveyed to them, rentcharges being reserved to the grantors by way of consideration; and a form of conveyance was adopted corresponding in all material respects with the conveyances under which the plaintiffs and the first defendant held; and the form bore a note in the following terms: "It is intended as a general rule, with a view to giving purchasers rights as between themselves, to insert similar restrictions in grants and leases of properties of the same class, although vendors do not undertake to insert them in all cases."

The former owner of the estate, in 1895, sold and conveyed the fee simple of an hotel forming part of the estate to Y., the plaintiffs' predecessor in title, who entered into covenants with the vendor and his assigns that the land so conveyed should not be used for any purpose likely to lessen the value of or materially interfere with the enjoyment of any other property belonging, at the date of the conveyance, to the vendor or to any lessee or grantee of the vendor: and the conveyance contained a proviso that all lands within a reasonable distance of the hotel, having regard to the then subsisting and previous nature of the locality, should be held by the respective grantees or lessees thereof, subject to those restrictions: and it was provided that (without prejudice to the right of the purchaser to enforce against any owner or lessee any of the restrictive covenants) the vendor was to be under no personal liability for inserting or not inserting in any future grant or lease similar restrictions, or for not enforcing the observance in respect of any part of the estate of any of the restrictions, or for releasing any grantee or lessee from the same. It was admitted that the plaintiffs to whom the hotel was subsequently conveyed were, as the assigns of Y., entitled to sue upon any of the covenants upon which Y. would be entitled to sue by virtue of the conveyance to him.

Later, in 1911, the testamentary trustees of the then deceased former owner of the Cary estate sold and conveyed other part of the same estate

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adjoining the hotel to N., the first defendant's predecessor in title, who entered into restrictive covenants with the vendors corresponding with those to which the hotel was made subject, except that the property of which the value was not to be lessened or materially interfered with was described as any other property devised by the will of the testator or held under any grant or demise made by the testator or the owners. It was admitted that the defendant, to whom the last mentioned land was subsequently conveyed, was an assign from N. for all her estate under the conveyance in 1911.

In an action by the plaintiffs as owners of the hotel claiming an injunction to restrain the defendants from using or permitting to be used the adjoining premises for the purposes of a Skee Ball alley, or for any purpose likely to lessen the value of or materially interfere with the enjoyment of the hotel:—

Held, first, that, although the burden of the restrictive covenants entered into by N. was annexed to the land conveyed to her and the first defendant having acquired the legal estate in the land with notice was bound, yet the benefit of the covenants did not run with the hotel either at law or in equity, for the reason that when N. entered into them with the covenantees the hotel had already been parted with to a stranger; and secondly, that, although by the adoption of a systematic policy of granting the fee simple when sales of the freehold became practicable, involving the imposition of a regular system of covenants intended to enure for the benefit inter se of all the persons who from time to time became owners of portions of the estate, a common intention that there should be mutual obligations was established, yet, owing to the absence of a sufficient definition of the geographical area within which the burden and benefit of the covenants was intended to extend, the plaintiffs were not entitled to the relief claimed.

The principle of *Elliston* v. *Reacher* [1908] 2 Ch. 374, 384 applied to an estate scheme which was not a building scheme as usually understood.

WITNESS ACTION.

The Torbay Hotel and the adjoining premises No. 9 Cary Parade at one time formed part of the family estate at Torquay known as the Cary Estate. That estate comprised about half the present town of Torquay together with a considerable tract of land in its neighbourhood, to a large extent unbuilt upon. So far as regards the portion of the estate now forming part of Torquay, the land was in and before the last quarter of the nineteenth century turned to account by a system of leases in some cases renewable and in others for years. Towards the end of the year 1890, those who controlled the Cary Estate adopted a new policy of development and intended, as the various leases

dropped in, or as the various lessees were desirous of purchasing, to grant out the land to purchasers (who would often be the sitting tenants) by way of fee simple conveyances, reserving rentcharges to the grantors by way of consideration, or part consideration for the conveyances. The leases under which most of the estate was at that time held contained more or less uniform covenants of a familiar type as to the user of the land leased (trading being in some cases entirely barred, in some cases permitted, with a proviso against objectionable trades) and as to the buildings to be placed upon the land leased. It appeared that about 1890 discussions took place between the solicitors of the Cary Estate and other solicitors in Torquay, with the result that a form of conveyance was prepared, which had ever since been used as the basis of the conveyances executed by the owners from time to time of the Cary Estate on sales of the built upon portions thereof. The wording of that form of conveyance (which was put in evidence) corresponded in all material respects with the provisions of the conveyances, under which the plaintiffs and the defendant Jenkins respectively derived title. The form bore a note in the following terms: "It is intended as a general rule with a view to giving purchasers rights as between themselves to insert similar restrictions in grants and leases (not being renewable leases) of properties of the same class, although vendors do not undertake to insert them in all cases." There was no evidence before the Court as to what particular parts of the Cary Estate had in fact been conveyed by conveyances in the form in question, but the part so dealt with was said to be considerable.

The eastern portion of the hotel, being the part which abutted on No. 9 Cary Parade, and the only portion of the hotel with which the action was concerned, was conveyed to Henry Young, the predecessor in title of the plaintiffs, by an indenture dated November 16, 1895, and made between R. S. S. Cary of the one part and Young of the other part. The vendor was defined as including R. S. S. Cary and his heirs and executors or administrators and his or their

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assigns or such one or more of the same persons as the context and circumstances of the case should admit and the purchaser was defined as including Young and his heirs and executors or administrators and his or their assigns or such one or more of the same persons as the context and circumstances of the case should admit. The deed witnessed that, in consideration of a yearly rentcharge limited to him, the vendor granted to the purchaser the hereditaments in question in fee simple subject to a subsisting lease stated to be then vested in the purchaser, to the intent that the term created by the lease might merge and be extinguished. Uses were then declared to secure the rentcharge; and subject thereto and to covenants thereinafter contained, a use was declared for the purchaser in fee. The purchaser then covenanted to pay the rentcharge and that, during a period to continue until twenty-one years after the death of the last survivor of Queen Victoria and her descendants living on the previous June 1, 1895, the hereditaments assured were to be enjoyed subject to certain restrictions—namely, first, that without the previous written consent of the vendor no building of a greater height than 8 feet from the ground on the outside should be erected upon the land thereby assured nor should any addition to or alteration of the exterior of the said messuage at a height exceeding 7 feet from the ground be made without the consent in writing of the vendor, nor with or without such consent so as to materially injure adjoining or adjacent premises; and, fourthly, that without such consent the land assured and the buildings thereon should not be used for the purpose of carrying on any noisy noxious or offensive trade nor (with or without such consent) for any purpose likely to lessen the value of the hereditaments assured or to lessen the value of or materially interfere with the enjoyment of any other property belonging at the date of the conveyance to the vendor or to any lessee or grantee of the vendor. Then there came (amongst others) the following provisoes: "That if any dispute shall arise as to whether any proposed new or additional building or alteration or any user of the premises is of such a description as to justify

the vendor in withholding his consent to the building or to such user thereof or if any dispute shall arise between the vendor on the one part and the purchaser on the other part or between the purchaser on the one part and any owner grantee lessee or occupier on the other part as to what is a 'reasonable distance' or 'material injury' within the meaning of the clause next hereinafter written the matter in dispute shall be referred to two arbitrators one to be appointed by each party And that (subject to the proviso next hereinafter contained and to all disabilities of the vendor by reason of the conditions and restrictions or absence of conditions or restrictions in leases or grants from time to time subsisting) all lands within a reasonable distance of the hereby assured hereditaments having regard to the general then subsisting and previous nature of the locality shall be held by the respective grantees or lessees (except lessees of compulsorily renewable leases) and occupiers thereof subject to the conditions and restrictions firstly and fourthly hereinbefore contained as conditions and restrictions binding so far as the law will allow in perpetuity on such lands Provided always that (without prejudice to the right of the purchaser to take any proceedings against any owner lessee or occupier of any part of the said lands to enforce the performance or observance of or to obtain compensation for the breach non-performance or non-observance of any of the said conditions or restrictions) the vendor shall be under no personal liability for either (1.) inserting or not inserting in any future grant or lease of any part of the said lands a clause similar to the clause lastly hereinbefore contained or (2.) not enforcing or attempting to enforce the performance or observance in respect of any part of the said lands of any of the said conditions or restrictions or (3.) releasing any grantee or lessee of any part of the said lands or any person claiming through any such grantee or lessee from any of the said conditions and restrictions, unless such release is not only wilful but would also materially injure any property of the purchaser within the said reasonable distance."

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It was admitted that the plaintiffs were assigns from Young of all his estate under the deed of November 16, 1895, and that the conveyance to the plaintiffs would pass not only Young's estate, but also the right to sue upon any of the covenants upon which Young would be entitled to sue by virtue of the provisions of the conveyance to him.

As regards the title of No. 9 Cary Parade: R. S. S. Cary died on September 2, 1898, and the conveyance dated October 7, 1911, under which the defendant Jenkins derived title from the Cary estate, was between two persons described as the testamentary trustees of the one part and Mrs. Norminton of the other part. The expression "testamentary trustees" was defined as including the two persons so named and the survivor of them and every other person who should be appointed a trustee of the will and codicils of R. S. S. Cary. The expression "the owners" was defined to mean the testamentary trustees and all persons claiming through R. S. S. Cary any beneficial estate or interest in the hereditaments assured; and the "purchaser" was defined to mean Mrs. Norminton and her heirs and executors or administrators and her or their assigns. After recitals aimed at showing how the trustees' title had been freed from various incumbrances created by the testator and various charges created by his will, the hereditaments in question were, in consideration of a yearly rentcharge, conveyed subject to a subsisting lease stated to be vested in the purchaser, to uses to secure a rentcharge, and subject to the covenants thereinafter contained to the use of Mrs. Norminton in fee. Then followed covenants by the purchaser, to continue during a period of restriction to terminate twenty-one years after the death of the last survivor of Queen Victoria and her descendants living on September 26, 1911, in terms corresponding almost precisely with the covenants and provisoes in the conveyance of the hotel, but with the following differences—namely, that the covenant against erection of buildings was phrased, "so as to materially injure adjoining or adjacent premises devised by the will and codicils of the testator or held under any grant or demise made by the

testator or the owners"; and that, whereas in the conveyance of the hotel the restriction as to trade was against noisy, noxious and offensive trades, the restriction in the conveyance of October 7, 1911, was against the carrying on of any trade; and that the property the value of which was not to be lessened or which was not to be materially interfered with was described as any other property devised by the will and codicils of the testator or held under any grant or demise made by the testator or the owners.

It was admitted that the defendant Jenkins was an assign from Mrs. Norminton of all her estate under the deed of October 7, 1911.

It appeared from a plan produced in evidence, being an enlargement of the Ordnance Map, that the plaintiff's hotel fronted to the south on Torbay Road. Torbay Road continued eastward to the harbour, but the hotel was at a corner formed between Torbay Road and Cary Parade which diverged from Torbay Road in a north-easterly direction. To the east of the hotel, the defendants' house, No. 9 Cary Parade, fronted on Cary Parade. There were nine old houses in Cary Parade, No. 9 being the westernmost. These were old houses standing back from the road with an open garden or forecourt in front of each house. The gardens of some of the easternmost houses in the row had been built upon for some time; but in March, 1924, the forecourts of No. 9 and of the four houses next to the east were open. The defendant Jenkins was minded to build a shop upon the forecourt of No. 9, and after some negotiations entered into an agreement with the plaintiffs.

That agreement was dated March 20, 1924, and was in the form of a deed, to which Jenkins and the plaintiffs were parties: it recited that Jenkins was seised in fee simple of No. 9 Cary Parade subject to the yearly rentcharge and to the building and other covenants and restrictions contained in the conveyance of October 7, 1911. It also recited that the plaintiffs were seised in fee simple of the Torbay Hotel subject to the rentcharge and to the building and other covenants and restrictions contained in the conveyance of

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November 16, 1895. There was then a recital that No. 9 Cary Parade and the Torbay Hotel were portions of the Cary Estate and that it had been the general rule, with a view to giving purchasers from the owners of the Cary Estate rights as between themselves, to insert similar provisions and restrictions in reference to building and user in the conveyances of properties to purchasers. Then came a recital that the conveyance of No. 9 Cary Parade contained a covenant precluding the erection of any new buildings or altering any existing or future buildings without the consent in writing of the owners of the Cary Estate and a covenant against the user of the property thereby conveyed for the purpose of carrying on any trade. A recital followed that Jenkins had applied to the plaintiffs for their consent to construct a shop in the front garden of 9 Cary Parade and to use the said premises for the purpose of trade and that the plaintiffs had agreed to give their consent on the terms thereinafter mentioned. It was then witnessed that the plaintiffs consented to the erection by Jenkins of the new or additional buildings indicated on the plan attached, but not further or otherwise, and that Jenkins for himself his heirs executors administrators and assigns covenanted with the plaintiffs to erect such new buildings in accordance with the plan and not at any time thereafter to alter or add to such new buildings without the consent in writing of the owners for the time being of the Torbay Hotel, but such consent should not be required to any alterations to the shop front, provided that no extension should be made to the line of frontage or the height of the extended buildings.

Having obtained that consent the defendant Jenkins proceeded to build on the forecourt of No. 9 Cary Parade, and in the course of building he placed a gutter along the edge of the roof of the building which overhung the passage way which admittedly belonged to the plaintiffs and thereby committed a trespass upon the plaintiffs' premises. The plaintiffs agreed at the trial to withdraw their claim for relief in respect of such trespass, the defendants undertaking to

pay, by way of acknowledgment of the plaintiffs' right to remove the gutter, the yearly sum of one shilling.

The defendant Jenkins, instead of altering the shop front, as he was entitled to do under the agreement, substituted a roll-shutter along the line of frontage which was capable of being closed. When the shutter was up, persons entering from the street found themselves in a triangular space formed by the frontage of the property to the pavement on the south, a wall on the east within Jenkins' property and parallel to the eastern boundary of the property, and on the third side by an ornamental railing. The triangular space afforded room for a considerable number of spectators to stand at the barrier and look into the Skee Ball alley, where they would find a series of six tables about 36 feet in length upon which the game of Skee Ball was played.

The defendant Lawley had taken a tenancy of No. 9 Cary Parade and thereon conducted the business of the Skee Ball alley.

The plaintiffs alleged that the establishment of the Skee Ball alley materially interfered with the enjoyment of the hotel by reason of noise and its attraction of spectators on the pavement outside the defendants' premises, and evidence was given by witnesses called in support of that contention and also to prove that the value of the hotel had been or was likely to be affected by the carrying on of such a form of entertainment as Skee Ball in the manner complained of.

The plaintiffs sought a declaration that the erection and use of the building in the manner complained of was a breach of the covenants in the agreement of March 20, 1924, and the conveyance of October 7, 1911, an injunction to restrain the defendants and each of them from using or permitting to be used No. 9 Cary Parade for the purpose of a Skee Ball alley or in any manner or for any purpose likely to lessen the value of or materially interfere with the hotel.

Alexander Grant K.C. and *H. F. F. Greenland* for the plaintiffs. First, the defendant Jenkins is estopped by the

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recitals in the deed of March 20, 1924, from contending that the plaintiffs are not entitled to enforce the restrictive covenants referred to therein: Norton on Deeds, p. 194; Halsbury's Laws of England, vol. xiii., p. 366, cl. 510. Moreover the recitals, which are clear and unambiguous, that the defendant had applied to the plaintiffs for their consent to build a shop and use it for the purposes of trade and that the plaintiffs had agreed to grant their consent, created, by implication, an obligation on the part of the defendant to use the premises for no other purpose than for trade: the affirmative agreement implied the negative: *Mackenzie* v. *Childers*. (1) The recitals bound the defendant Lawley as well, for he must have taken his lease with notice of them through his title deeds. Secondly, when Young purchased the hotel in 1895, he and his assigns became entitled to the benefit of any restrictive covenants thereafter to be entered into by a purchaser of any other part of the Cary Estate, and he and his assigns were so entitled by virtue of the covenant in the conveyance of 1895—namely, that all lands within a reasonable distance of the hotel thereby conveyed should be held by the respective grantees or lessees subject to the restrictions subject to which the hotel was conveyed. That was sufficient to annex to the hotel the benefit of the restrictive covenants to be entered into by Norminton on her purchasing No. 9 Cary Parade, which benefit formed part of the subject-matter of Young's purchase in 1895. That was a right which Young had under his conveyance in 1895, and that by the application of the principle of *Rogers* v. *Hosegood*. (2) Thirdly, this is not a case where the vendor took the covenants merely for his own benefit and protection, but is what is known as a building scheme case—namely, a case where the covenants are entered into for the common advantage of the several purchasers. The existence of a building scheme may be proved either by the express terms of a contract between the parties or by a common intention to be collected or inferred from the nature of the whole transaction and other relevant facts: of the

(1) (1889) 43 Ch. D. 265. (2) [1900] 2 Ch. 388.

latter class *Nottingham Patent Brick and Tile Co.* v. *Butler* (1) and *Elliston* v. *Reacher* (2) are instances.

[They also referred to *Spicer* v. *Martin* (3); *Reid* v. *Bickerstaff* (4); *Lord Northbourne* v. *Johnston & Son* (5); and *Kelly* v. *Barrett*. (6)]

If it be necessary that the area should be defined in a case where reciprocity of rights and obligations is established by the express terms of the contract itself, the area over which they were intended to extend is sufficiently indicated in the present case, because it is always capable of being defined. The covenant is that all lands within a reasonable distance of the hotel should be held of the respective grantees subject to the restrictions to which the hotel was subject. What was a reasonable distance was to be determined by arbitration. "Id certum est quod certum reddi potest." And there is the covenant against building to the material injury of the "adjoining or adjacent premises." The terms "adjoining" and "adjacent" are synonymous and refer (inter alia) to the hotel premises.

Jenkins K.C. and *Robert Peel* for the defendant Lawley. First, the plaintiffs are estopped by the deed of March 20, 1924, from alleging a breach of the covenant by the defendants by using their premises as a Skee Ball alley. The consent given by the deed is to use the new building for trade in the sense in which that word is used in the conveyance to the defendant Jenkins of 1911. In its narrow sense, no doubt, "trade" means buying and selling goods, but the plaintiffs gave their consent to the defendant Jenkins carrying on that which was forbidden by that conveyance. Carrying on a Skee Ball alley is a trade in the sense in which that term is used in the deed of March 20, 1924. The Court has no jurisdiction to restrain by injunction the breach of such a covenant as not to use a building in such a way as would be likely to lessen the value of other property. It is too vague

(1) (1885) 15 Q. B. D. 261; (1886) 16 Q. B. D. 778.
(2) [1908] 2 Ch. 374, 384; affirmed on appeal 665.
(3) (1888) 14 App. Cas. 12.
(4) [1909] 2 Ch. 305.
(5) [1922] 2 Ch. 309.
(6) [1924] 2 Ch. 379.

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and uncertain a covenant for the Court to enforce : *Collins* v. *Plumb* (1) ; *Keppell* v. *Bailey*. (2)

Secondly, the covenant is on another ground too vague to be enforced. The area to be protected is not sufficiently defined. The description of the property the value of which it was attempted to protect by the covenant in the conveyance of October 7, 1911, as "any other property devised by the will and codicil of the testator or held under any such grant or demise by the testator or the owners" is too vague and indefinite. In *Nottingham Patent Brick and Tile Co.* v. *Butler* (3) the question was whether the various purchasers were entitled to the benefit of and liable under the covenants inter se. There was no question there as to what particular area was affected. In *Elliston* v. *Reacher* (4) the document there referred to as containing the restrictions was identified and it indicated an original intention to have a building scheme, but here nothing is known about the conveyances of the parts of the Cary Estate other than No. 9 Cary Parade. This is an attempt to restrict the enjoyment of a piece of land without properly defining the extent of the obligations imposed upon the purchaser thereof. Mrs. Norminton was left under a contractual relationship in respect of the land she purchased the extent of which could only be ascertained by inquiry, there was nothing to inform her as to the extent of her obligations or rights under her conveyance. In *Reid* v. *Bickerstaff* (5) the plaintiff failed to establish a general building scheme relating to a definite area. Although in the present case there may have been an attempt to create reciprocal rights and obligations, they are too uncertain to be enforced.

Owen Thompson K.C. and *John W. F. Beaumont* for the defendant Jenkins adopted the last argument.

Cur. adv. vult.

March 29. CLAUSON J. In this case the plaintiffs are owners of a first-class hotel at Torquay ; the defendant

(1) (1810) 16 Ves. 454, 459.
(2) (1834) 2 Myl. & K. 517, 535.
(3) 15 Q.B.D. 261 ; 16 Q.B.D. 778.
(4) [1908] 2 Ch. 374, 384 ; affirmed on appeal 665.
(5) [1909] 2 Ch. 305.

Jenkins is the owner in fee of an adjoining property, No. 9 Cary Parade; the defendant Lawley is a lessee from Jenkins for a term of years. The defendant Lawley is carrying on upon No. 9 Cary Parade the business of a Skee Ball alley. The plaintiffs claim to have the right to prevent the defendants using No. 9 Cary Parade for any purpose likely to lessen the value of the plaintiffs' hotel or materially interfere with the enjoyment of it. The plaintiffs by their counsel disclaimed any relief on the basis of common law nuisance; they rest their case on certain provisions to be found in certain documents relating to the properties. Assuming the plaintiffs to have the rights which they claim, the question arises whether the carrying on by the defendant Lawley at No. 9 Cary Parade of the business of a Skee Ball alley is likely to lessen the value of the plaintiffs' hotel or materially to interfere with the enjoyment of it. There are certain subsidiary matters in issue arising out of a document, which I shall mention later, entered into between the plaintiffs and Jenkins on March 20, 1924. [His Lordship then stated the facts above set out relating to the method of development of the Cary Estate, the conveyances of the Torbay Hotel and No. 9 Cary Parade to Young and Norminton respectively, the respective predecessors in title of the plaintiffs and the defendants, the deed of agreement of March 20, 1924, and the events subsequent thereto, and continued :] It was argued that the effect of the agreement of March 20, 1924, and its recitals was to estop Jenkins from contending that the plaintiffs have no right of action upon the covenants referred to in the recitals. I do not doubt that the parties to the agreement thought at the time that the effect of the recited deeds was to give the plaintiffs a right of action against Jenkins, if he broke the covenants in the recited conveyance to his predecessor in title. But the recitals merely state certain deeds. There is no recital that the effect of the deeds is as suggested. A party to a deed is bound by the recitals when they are precise and clear, but not by inferences which may be drawn from recitals. The authorities to establish this proposition are referred to

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in *Onward Building Society* v. *Smithson*. (1) The agreement seems to me to leave untouched the question as to the operation and effect at law or in equity of the covenants in the documents therein recited.

It was further suggested that by the agreement the defendant Jenkins bound himself not to use the erection to be built under the licence given by the agreement for any purpose other than a shop. I do not so construe the agreement. He binds himself to build according to certain plans and not to alter the buildings except as to the shop front without consent. The agreement does not contain, nor can I imply an agreement on Jenkins' part not to use the premises except for the purposes of trade, though it does on its true construction contain a licence to the defendant Jenkins to use the premises for the purpose of trade.

Assuming that I am right in my construction of the agreement of March 20, 1924, the mere erection and fitting up of this structure cannot be suggested to infringe any rights of the plaintiffs, subject only to the small points of trespass which I have dealt with. It is, however, alleged that the plaintiffs are entitled to restrain the defendants from carrying on the business of conducting this Skee Ball alley on No. 9 Cary Parade, because by so using the property they are using it for a purpose likely to lessen the value of or materially interfere with the enjoyment of the plaintiffs' hotel. It becomes necessary, therefore, to consider (*a*) whether the plaintiffs have a right to restrain the defendants from using No. 9 Cary Parade for a purpose likely to lessen the value of or materially interfere with the enjoyment of the plaintiffs' hotel, and (*b*) whether in fact the user of No. 9 Cary Parade for the purposes of a Skee Ball alley is likely to lessen the value of or materially interfere with the enjoyment of the plaintiffs' hotel. I propose to follow the example set me by Sargant J. in somewhat similar circumstances in *Chambers* v. *Randall* (2) and to deal with the point of law first.

I was referred to *Rogers* v. *Hosegood* (3) as an authority

(1) [1893] 1 Ch. 1. (2) [1923] 1 Ch. 149.
(3) [1900] 2 Ch. 388.

which would justify me in holding that the plaintiffs could sue Jenkins as Mrs. Norminton's assign upon the covenant by Mrs. Norminton as covenantor with the Cary trustees as covenantees contained in the deed of October 7, 1911. Turning to that case, I find that I must first ascertain whether the covenant in its inception binds the land conveyed to Mrs. Norminton and subsequently to Jenkins. On that point there is no difficulty; it plainly does. And accordingly the burden of the covenant is annexed to No. 9 Cary Parade and passes to Jenkins subject to proof that the legal estate if acquired, has been acquired with notice of the covenant. On that point there is no dispute. Obviously Jenkins cannot disclaim notice of a covenant which is contained in one of his title deeds and Lawley as his lessee is admittedly in the same position: see *Patman* v. *Harland*. (1) But how can it be said that the benefit of the covenant has become attached to the Torbay Hotel and has passed to the plaintiffs? When the covenant was entered into, on October 7, 1911, the covenantees (the Cary trustees) had no estate or interest in the Torbay Hotel save in so far as persons claiming under them are entitled to the respective rentcharges; and I note in passing that the benefit of a covenant with a vendor who retains a rentcharge issuing out of the property sold does not run at law with the rentcharge: *Haywood* v. *Brunswick Building Society*. (2) How then could they attach to land which they did not then own the benefit of a covenant which had not before existed? The conception of the benefit of a covenant running at law with land in which the covenantee had no estate or interest at the date of the covenant is surely an impossible one, and equally so, if his only estate or interest is as assign of a rentcharge. In the class of cases of which *Rogers* v. *Hosegood* (3) is typical, equity, so far as the benefit of the covenant is concerned, merely follows the law, and is resorted to only for the purpose of furnishing the form of remedy (e.g., injunction rather than damage) or of removing such difficulties as that which in fact arose in *Rogers* v.

(1) (1881) 17 Ch. D. 353. (2) (1881) 8 Q. B. D. 403.
(3) [1900] 2 Ch. 388.

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Hosegood (1)—namely, that the covenantee was legally a stranger to the estate (as mortgagor), though in contemplation of equity the real owner. I cannot see on what equitable principle land to which the benefit of a covenant cannot be attached at law, because the land belongs at the time to a total stranger to the covenant, can in a Court of equity be treated as land to which the benefit of such a covenant can be attached in equity. I asked for an authority to support such a suggestion, but counsel could not assist me. The suggestion seems inconsistent with the view of the law expressed by Farwell J. in *Rogers* v. *Hosegood* (2), where he says he cannot see how such a covenant could run in equity, if it did not run at law, having previously observed that a covenant which runs with the land must have the characteristic that it is made with a covenantee who has an interest in the land. If the plaintiffs' case has to be based upon a right to sue on the covenant in the deed of October 7, 1911, it must in my judgment fail.

There is, however, an alternative ground put forward in support of the plaintiffs' right to sue, a ground unaffected by any questions which may be raised on the operation of covenants at law, or their operation in equity when equity is exercising its concurrent and auxiliary jurisdiction (see *Lord Strathcona Steamship Co.* v. *Dominion Coal Co.* (3)), and follows the law. Where an owner of land deals with his land on the footing of imposing restrictive obligations on the use of the various portions of it as and when he alienates them for the common benefit of himself (so far as he retains any of the land) and of the various purchasers inter se, a Court of equity will give effect to this common intention, notwithstanding the absence of mutual covenants, provided that the intention that there should be mutual obligation is sufficiently established. The principle has been well recognized since *Renals* v. *Cowlishaw* (4), and indeed long before, and in recent years has been freely applied in what are sometimes known as the "building scheme" cases, of

(1) [1900] 2 Ch. 388.
(2) [1900] 2 Ch. 388, 395, 398.
(3) [1926] A. C. 108, 124.
(4) (1878) 9 Ch. D. 125.

which *Elliston* v. *Reacher* (1) is a conspicuous example. The present is not, of course, the case of a building scheme in the ordinary sense; the Cary Estate owners were not setting out to deal with vacant land and to parcel it out in plots for sale. They had, in or about 1890, an already fully developed estate; but they were adopting a scheme for dealing with its various portions, as and when sales of the freehold became practicable, by alienating the fee simple from time to time under a systematic policy, involving the imposition on the various portions of the estate, as and when sold, of a regular system of covenants intended to enure for the benefit inter se of all persons who from time to time became owners of portions of the estate. That the facts are as I have thus stated them, I am satisfied on the oral evidence given before me and on scrutiny of the deeds relating to the plaintiffs' and defendants' properties and of the common form of document prepared in the circumstances which I have stated earlier in this judgment. It appears to me that the principle as regards the common intention of the parties on which the building scheme cases proceed would apply to the present case, notwithstanding that the circumstances differ from those of the ordinary building scheme. Reference however to the terms in which the judgment of Parker J. is expressed in *Elliston* v. *Reacher* (1) indicates that there is a limit beyond which the Court has not yet passed. Such a common intention as I have described will be carried into effect by the Court by enforcing the agreed restrictions on any owner for the time being of the land intended to be affected thereby, at the suit of any owner for the time being of any part of the rest of the property intended to be comprised in the common area of mutual obligation if, but only if, the Court can ascertain with reasonably clear definitiveness the geographical area within which those mutual obligations are intended to operate. In *Reid* v. *Bickerstaff* (2) the impossibility of ascertaining this geographical area was one at least of the circumstances which prevented the Court of Appeal from enforcing, as mutual

(1) [1908] 2 Ch. 374, 384. (2) [1909] 2 Ch. 305.

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obligations, covenants of a uniform character entered into with a series of successive purchasers. Lord Macnaghten in *Spicer* v. *Martin* (1) was disposed to hesitate, if he were invited to extend the principles recognized in *Renals* v. *Cowlishaw* (2), and at all events in a Court of first instance, a distinct limit which I am not free to pass is to be found in the requirement I have mentioned that the area within which the obligations are to operate must be clearly ascertained.

No evidence was given before me to define the area within which I should find the hereditaments over which the burden and benefit of the restrictive covenants were intended to extend. The frame of the covenants is so adjusted as to provide for arbitration in any particular case as to the distances within which the mutual obligations should be permitted to operate. This, so far from providing me with a defined area, indicates, to my mind, that the area of operation of the mutual restrictions is intended to be and recognized to be shifting and uncertain.

For the reasons I have endeavoured to express I am of opinion that the plaintiffs have no right to call upon the Court to restrain the defendants from using No. 9 Cary Parade for a purpose likely to lessen the value of or materially interfere with the enjoyment of the plaintiffs' hotel. In order to prevent possible misunderstanding I add that my opinion in no way affects any right the plaintiffs might have to sue for nuisance at common law, but no such claim is set up in this action.

[His Lordship then dealt with the case upon the facts put in evidence at the trial, and held that, even assuming that he were wrong in the view he took upon the question of law, it was not proved that the carrying on the business of a Skee Ball alley materially interfered with the enjoyment of the hotel or was calculated to lessen its value.]

Solicitors: *Walter Crimp & Co., for Kitsons, Hutchings, Easterbrook & Co., Torquay; Ernest G. Scott; Torr & Co., for Almy & Thomas, Torquay.*

(1) 14 App. Cas. 12, 24. (2) 9 Ch. D. 125.

H. C. H.

ACHILLI *v.* TOVELL.

ASTBURY J.

1927

July 26, 27.

[1926. A. 1512.]

Restrictive Covenant—Breach—Substantial Damage—Assignee with Notice—No Privity of Contract—Mandatory Injunction or Damages—Discretion.

Where a breach of a restrictive covenant causes substantial damage the Court has no discretion to award damages in lieu of a mandatory injunction.

This rule applies whether the covenant is broken by the original covenantor or by an assignee with notice.

WITNESS ACTION.

The plaintiff Achilli, a lady living in Naples, was the owner in fee simple of a small cottage, 98 Magdalen Street, Colchester. The other plaintiffs were her tenants.

By a conveyance on sale dated June 2, 1916, the plaintiff Achilli's predecessors in title conveyed an adjoining property, 97 Magdalen Street, to the defendant Tovell, a merchant and contractor, who for himself and his assigns covenanted with the vendors and their assigns, and also separately with each of them and her or his assigns, that no building should be erected on the premises thereby assured which would materially restrict or interfere with the free access of light and air to the windows then existing in the vendors' adjoining house, 98 Magdalen Street.

In February, 1917, the defendant Tovell built a ten foot wall in place of the existing fence between the properties. To this no objection was made.

On June 7, 1920, the defendant company, "John Tovell, Ld.," were incorporated as a private company to purchase the defendant Tovell's business. The defendant Tovell was managing director, and held 4000 of the 5000 1*l.* shares. His wife's family now held the remaining 1000. He and his wife were the directors.

The property was not formally conveyed to the company, but it was in their occupation, and they were owners in equity, and probably became legal owners on January 1, 1926, under the Law of Property Act, 1925 (15 Geo. 5, c. 20), Sched. I., Part II., para. 3.

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In January, 1926, the defendant company, through their managing director the defendant Tovell, asked the plaintiff Achilli's rent collector for permission to put scaffolding on the plaintiff Achilli's premises with a view to raising their stables. The rent collector, who only knew of certain old stables a good way off from No. 98, gave permission. New stables had, however, in fact been erected in 1917 just the other side of the ten foot wall adjoining No. 98, and it was these new stables that it was intended to raise. The rent collector was merely the plaintiff Achilli's agent in small matters, and had no authority to authorize a breach of covenant, and the permission quantum valeat was given under a misapprehension as to the stables referred to.

Relying, however, on this permission and without knowledge of the misapprehension, the defendant company raised their new stables and raised their wall to 19 feet, thereby very seriously cutting off the light and air from the windows of No. 98. They did not in the event require to put scaffolding on the plaintiff's premises. The wall was completed in April, 1926.

On April 22, 1926, the rent collector met the defendant Tovell, and asked him to refer to his conveyance in respect of the light and air covenant, and on May 14 he wrote stating that he had reported the breach of covenant to the plaintiff Achilli, who had instructed him to place the matter in her solicitors' hands.

On July 10, 1926, the plaintiff Achilli and her tenants commenced this action against the defendant Tovell and the company for a mandatory injunction in respect of the increased height of the wall, and for damages.

There was no doubt on the facts that there had been a very serious breach of covenant, and the only question was whether the plaintiff Achilli could insist on a mandatory injunction, or whether the Court in the circumstances could award damages in lieu thereof.

The evidence as to the loss in value was conflicting. The cottage before the obstruction was worth about 200*l.* The

plaintiffs' witnesses estimated the depreciation at about 100*l.* The defendants' witnesses put it at about 25*l.*

Each defendant paid 50*l.* into Court with a denial of liability.

Owen Thompson K.C. and *Douglas D. Jones* for the plaintiffs. This is a covenant case. The breach is serious, and the plaintiff Achilli, being unwilling to sell her property or accept damages, is entitled to insist on her right to a mandatory injunction.

Charles Harman for the defendants. The defendant Tovell is bound by the legal covenant, but he has not broken it. Even if partly responsible for the breach, he is not the owner of the property, and the only remedy against him is in damages.

The defendant company on the other hand are not legally bound by the covenant at all. They are merely assignees with notice, and against them the remedy is purely equitable : *In re Nisbet & Potts' Contract.* (1)

The distinction between enforcing a legal restrictive covenant and a mere equity is of great importance : *Osborne* v. *Bradley* (2) ; *Elliston* v. *Reacher* (3) ; *Sharp* v. *Harrison.* (4) In the former case the Court is practically bound to grant an injunction without regard to the quantum of damages. In the latter case its discretion is wider, and it will more readily give damages in lieu of an injunction. (5)

A mandatory injunction should only be granted in extreme cases : *Durell* v. *Pritchard.* (6) It is of great importance to see if the defendant knew he was doing wrong : *Smith* v. *Smith.* (7) Here the defendant company, though no doubt erroneously, bona fide thought they had obtained permission to raise the wall.

Again the tenants could obviously have complained directly or through the rent collector, but they did not do so. No

(1) [1906] 1 Ch. 386.
(2) [1903] 2 Ch. 446, 451, 452.
(3) [1908] 2 Ch. 374, 395.
(4) [1922] 1 Ch. 502.
(5) See *Kelly* v. *Barrett* [1924] 2 Ch. 379, 397.
(6) (1865) L. R. 1 Ch. 244, 250.
(7) (1875) L. R. 20 Eq. 500, 505 ; See also *Upjohn* v. *Macfarlane* [1922] 2 Ch. 256, 263, 264.

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complaint was in fact made till the wall was finished. This is an additional ground for saying that damages are an adequate remedy: *Shelfer* v. *City of London Electric Lighting Co.* (1)

The cases on mandatory injunctions are dealt with in Kerr on Injunctions, 6th ed., pp. 40-44. Taking all the circumstances into consideration the Court should exercise its undoubted discretion in the defendant company's favour, and award damages in lieu of an injunction.

Owen Thompson K.C. in reply. The Court has no doubt a judicial discretion even in the case of a legal restrictive covenant, as in *Sharp* v. *Harrison* (2), where the damage was nil. But the suggestion that where the damage is substantial the Court has a wider discretion to award damages in lieu of an injunction in respect of breaches of equitable restrictive covenants than it has in respect of legal restrictive covenants is contrary to a long chain of authorities, such as *Western* v. *Macdermott* (3); *Leech* v. *Schweder* (4); and *Nussey* v. *Provincial Bill Posting Co.* (5) The real truth is that, in the enforcement of restrictive covenants, an assignee with notice is in the same position as a covenantor. (6)

ASTBURY J. [after stating the facts]. I am extremely loath to order that this wall, a large and substantial building, shall be pulled down, seeing that the cottage, whose windows are protected by the covenant, is of very small value, and the damage which the plaintiff Achilli has suffered could, if she were willing to accept damages or be bought out, be easily arranged. She however is not willing, and I have no right to compel her to accept damages in lieu of an injunction.

The defendants contend that the company must be regarded as the owners of No. 97. That is probably right. John Tovell was turned into this limited company, he and his family now holding all the shares. There was no conveyance of

(1) [1895] 1 Ch. 287, 317.
(2) [1922] 1 Ch. 502.
(3) (1866) L. R. 1 Eq. 499; 2 Ch. 72.
(4) (1874) L. R. 9 Ch. 463, 474, 475.
(5) [1909] 1 Ch. 734.
(6) See *Richards* v. *Revitt* (1877) 7 Ch. D. 224, 227.

No. 97, but the company were incorporated to purchase John Tovell's business, and have been in occupation ever since, and must be considered owners in equity. It does not much matter. Either Tovell or the company own No. 97. I think the true position is that the company are the owners in equity and Tovell a trustee for them. It may be that under the Law of Property Act, 1925, the legal estate is now vested in the company. But whether that is so or not is immaterial. The company have put up this wall and are responsible for it, and claim the ownership of its site.

The company contend that this being a restrictive covenant, and they being not covenantors but only assignees with notice, are only bound in equity. That may be so. But I do not think it makes the slightest difference. The company as assignees purchased and hold the land subject to this absolute covenant not to erect a wall that would materially restrict or interfere with the light and air to these four windows. They have broken this covenant, of which they had full notice, and by which they are therefore bound in equity. It is idle to say that because the value of the cottage is trifling the damage is therefore trifling, within the authorities as to the discretion of the Court in cases of trifling damage. Here the covenant was intended to protect this very cottage, and whether the defendants like it or not, the plaintiff Achilli, if so minded, is entitled to keep her cottage and have this covenant respected. I cannot say the damages are trifling. The covenant has been broken as badly as possible so far as the plaintiff Achilli's property is concerned. The windows are practically blocked up.

In my opinion I have no jurisdiction or discretion to force the plaintiff Achilli against her will to accept damages in lieu of an injunction. On the authorities she is plainly entitled to a mandatory order if she asks for it. I am sorry she is not willing to take damages, as the defendant company are obviously in a position to pay them. But she is not willing, and I have no jurisdiction or discretion to refuse a mandatory order.

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There must therefore be a mandatory order to pull down so much of this wall as materially restricts or interferes with the access of light and air enjoyed by these windows before the recent raising. The defendant company must pay the plaintiffs' costs. There will be no order as to the defendant Tovell's costs. He and the company are in substance one, and the plaintiff did not know the true facts as to the company until some time after action.

I should like to add this. The defendant company's premises on the other side of this offending wall are large and substantial, and though the company have no equity to be relieved of this covenant, I cannot help hoping that the plaintiff Achilli will be willing to accept full compensation instead of having the wall pulled down. It has now been up a year. I will therefore grant a mandatory injunction, but I will suspend it for one month to give the parties an opportunity of coming to some arrangement. If the defendants or either of them serve notice of appeal within a fortnight I will suspend the injunction till after the hearing of the appeal. The defendant Tovell may take his own 50*l.* out of Court. The company's 50*l.* will remain in Court to answer costs. There will be liberty to apply, if necessary, as to the extent of the wall to be demolished.

Solicitors: *Doyle, Devonshire & Co., for Jones & Son, Colchester; Whites & Co., for Sparling, Son & Benham, Colchester.*

G. R. A.

In re HIGGS' AND MAY'S CONTRACT.

EVE J.

1927

June 23; *July* 12.

[1927. H. 1538.]

Law of Property—Undivided Shares—Statutory Trusts—Law of Property Act 1925 (15 *Geo.* 5, *c.* 20), *Sch. I., Part IV., para.* 1 (3.)—*Law of Property (Amendment) Act*, 1926 (16 *&* 17 *Geo.* 5, *c.* 11), *Schedule.*

By his will, W. H. directed that, after the death of his wife, which took place in 1922, his trustees should receive the whole income arising from his trust estate, and should divide the same equally between all his children and the child or children of any child who might be dead, such child or children taking between them the share their deceased parent would have been entitled to if living. And when and so soon as all his children should be dead except two, his trustees should sell and convert all his trust estate and divide the proceeds equally between his two surviving children and the child or children of deceased sons and daughters, such last mentioned children, if more than one, to take equally between them one equal share of the proceeds of sale. On December 31, 1925, the property was held upon trust to divide the income arising therefrom amongst ten children, seven grandchildren, and the legal personal representative of a deceased grandchild of the testator:—

Held, that the entirety of the land being settled land held under one and the same settlement in equity in undivided shares, the property was vested in the trustees of the will of W. H. in fee simple upon the statutory trusts referred to in para. 1 (3.) of Part IV. of Sch. I. to the Law of Property Act, 1925, and that it was not affected by para. 4, added to Part IV. of Sch. I. to the Act of 1925, by the Schedule to the Law of Property (Amendment) Act, 1926.

THIS application was made under s. 49 of the Law of Property Act, 1925, and it asked for a declaration that the property comprised in the contract for sale was vested in the applicants, as the trustees of the will of William Higgs, in fee simple upon the statutory trusts referred to in para. 1 (3.) of Part IV. of Sch. I. to the Law of Property Act, 1925, and that a good title to the property had been shown in accordance with the contract.

By his will, dated February 1, 1881, the testator, after appointing trustees, devised all his real estate and the residue of his personal estate to his trustees upon certain trusts therein mentioned during the life of his wife, and on her death, which took place on November 9, 1922, the testator directed that his trustees should receive the whole income

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arising from his trust estate, and should divide the same equally between all his children and the child or children of any child who might be dead, such child or children taking between them the share their deceased parent would have been entitled to if living, and when and so soon as all his children should be dead except two, his trustees should sell and convert all his trust estate, and divide the proceeds equally between his two surviving children and the child or children of deceased sons and daughters, such last mentioned children, if more than one, to take equally between them one equal share of the proceeds of sale.

The testator died on January 3, 1883.

On December 31, 1925, the property was held upon trust to divide the income arising therefrom amongst ten children, seven grandchildren, and the legal personal representative of a deceased grandchild of the testator.

By a contract, dated December 2, 1926, the applicants agreed to sell, and the respondent agreed to purchase, premises in Ballater Road, Brixton, forming part of the trust property. The respondent declined to accept the title, and contended that the case came within para. 4, added to Part IV. of Sch. I. to the Act of 1925, by the Schedule to the Law of Property (Amendment) Act, 1926, and that the land was vested in the tenants for life, in whose favour a vesting deed ought to be executed by the applicants, and who alone could make out a good title.

Topham K.C. and *Fawcus* for the applicants. Here the entirety of the land is settled land, held under one and the same settlement, and therefore it vests in the applicants by reason of para. 1 (3.) of Part IV. of Sch. I. to the Law of Property Act, 1925. It is suggested on the other hand by the respondent that the land vested in all the eighteen beneficiaries as tenants for life by reason of para. 4, added to Part IV., by the Schedule to the Law of Property (Amendment) Act, 1926. That cannot be correct. There is no question here of the land devolving together, not in undivided shares, and para. 4 does not apply. The land is held in

undivided shares, and it vests in the trustees on the statutory trusts for sale, as defined by s. 35 of the Law of Property Act, 1925.

R. L. Ramsbotham for the respondent. In this case the land was settled land before 1926, and continued to be so afterwards. It is settled land. There are trustees for the purposes of the Settled Land Act, 1925 (15 Geo. 5, c. 18), but the beneficiaries are entitled to the income in undivided shares, and therefore do not come within s. 19, sub-s. 2, of that Act, which requires that they should take as joint tenants. This defect is cured, and was intended to be cured, by the new para. 4, added to Part IV. of Sch. I. to the Law of Property Act, 1925, by the Amending Act of 1926, provided that on the cessor of the life interests the land can be said to "devolve together (not in undivided shares)." It is submitted that it does so devolve because, under the trust for sale, the land will go en bloc to the purchaser. The persons entitled to the corpus are not interested in the land in undivided shares, but only in the proceeds of sale, which is an entirely different matter. Para. 4 must be construed broadly. "Devolve" here means "go." Para. 1 (3.) of Part IV. can only apply when the corpus is held in undivided shares, which is not the case here. It is immaterial in what shares the income is enjoyed. The existence of more than one tenant for life is clearly contemplated, and as there are here both tenants for life and trustees for the purposes of the Settled Land Act, I submit that the purchaser is entitled, and ought to take his conveyance under the Settled Land Act. There is no need to resort to para. 1 (3.) of Part IV.; indeed to do so is to cut right across the provisions of the Settled Land Act, and deprive the tenants for life of their powers, without any necessity for so doing. If there are no tenants for life of the settled land the trustees can exercise their powers: s. 23 of the Settled Land Act, 1925.

Topham K.C. in reply. The land was settled land under the old law, so para. 1 (3.) would clearly apply if there was no amending Act: *In re Flint.* (1)

(1) [1927] 1 Ch. 570.

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HIGGS' AND MAY'S CONTRACT, *In re.*

On cessor of the life interest the whole must go in undivided shares if the decision in *In re Colyer's Farningham Estate* (1) is correct.

Cur. adv. vult.

July 12. EVE J. On January 1, 1926, the entirety of the land was settled land, held under one and the same settlement in equity in undivided shares vested in possession, and by virtue of para. 1 (3.) of Part IV. of Sch. I. to the Law of Property Act, 1925, would appear on that date to have vested in the applicants as trustees of the settlement as joint tenants upon the statutory trusts; and upon this assumption the contract of sale was entered into, and title thereunder deduced. But the purchaser declines to accept this title, and insists that the case comes within the new para. 4 added by the Amendment Act of 1926 to Part IV. of Sch. I. to the Act of 1925, and that the land is vested in the tenants for life, in whose favour a vesting deed ought to be executed by the applicants, and who alone can make out a good title.

I cannot accept this view. As there is nothing in the amending Act which repeals para. 1 (3.) no construction ought readily to be imposed on the new paragraph which would involve a conflict between the two. If possible, they should be so construed as to be applicable to the particular cases to which each is directed, and so that they may neither conflict nor overlap. By the amending paragraph, particular cases—those in which the settled land is so limited as to devolve as an undivided whole—are excepted from the operation of para. 1 (3.), and in my opinion that is all that is effected thereby. No doubt there must be some good reason for distinguishing this particular class of case, although for the moment I am not able to suggest what it is; but this much is, I think, abundantly clear, that no case can properly be held to fall within the new paragraph unless it can be shown to possess the particular qualification therein indicated, and, in my opinion, land settled upon trust for sale and division of the proceeds cannot by any stress of imagination

(1) [1927] 1 Ch. 677.

be described with accuracy as land so limited as to devolve or descend—for that, I take it, is what is meant by the word "devolve"—as an undivided whole.

Accordingly, I hold that the land agreed to be sold falls within para. 1 (3.), and that the contentions of the vendors are right. They are entitled to the declaration they ask, and the purchaser must pay the costs of the summons.

Solicitors for applicants: *Lewis & Sons.*
Solicitors for respondent: *Kingsbury & Turner.*

P. J. B.

In re LORD ALINGTON AND THE LONDON COUNTY COUNCIL'S CONTRACT.

[1927. A. 277.]

Settled Land—Subsisting Charge and Jointure—Settlement deemed to be subsisting—Trustees—Contract to sell the Land subject to Charge—Settled Land Act, 1925 (15 *Geo.* 5, *c.* 18), *ss.* 3, 31, 33.

By a disentailing deed of 1924 the property sold was assured to the use of the vendor in fee simple subject to all charges and incumbrances affecting the same. When the Settled Land Act, 1925, came into operation the property was vested in the vendor in fee but subject to two family charges which were interests vested in possession—namely, a sum of 8750*l.* secured by a term of 200 years, limited by a settlement of 1880, and a jointure rentcharge of 4000*l.* imposed upon the property by a deed of 1925. Before the disentailing deed of 1924 the property had been subject to a compound settlement constituted by the documents, including a disentailing deed of 1914, or some of them, mentioned in an order of the Chancery Division dated March 1, 1920, under which the trustees of the 1880 settlement were appointed trustees, for the purposes of the Settled Land Acts, 1882 to 1890, of the compound settlement. By a vesting deed of 1926 it was declared that the property was vested in the vendor in fee simple and that the trustees of the 1880 settlement were trustees of the compound settlement for the purposes of the Settled Land Act, 1925.

In these circumstances the question arose whether, if the purchase price of the property was paid to the existing trustees, the purchaser got a good title discharged from all claims in respect of the 8750*l.* and the 4000*l.* jointure rentcharge:—

Held, that immediately before the Settled Land Act, 1925, came into operation the property was not settled land, but that as it had been

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subject to a compound settlement under which the 8750*l.* was still a subsisting charge by s. 3 of the Settled Land Act, 1925, the settlement was deemed to be subsisting for the purposes of that Act; and that under ss. 31 and 33 the trustees of the settlement were trustees of it for the purposes of the Settled Land Act, 1925, and a receipt by them of the purchase money would free the land sold from the 8750*l.*

Held, also, that as under s. 31 the trustees of the compound settlement were the trustees of any settlement constituted by the compound settlement and any instrument subsequent in date or operation therefore the property was subject to a compound settlement constituted by the settlement of 1880, the disentailing deeds of 1914 and 1924, and the deed of 1925 which imposed the jointure of 4000*l.*, and on the receipt by the trustees of the purchase money the property in the hands of the purchaser would be free also from the 4000*l.* rentcharge. There would be an order that a good title to the property had been shown.

VENDOR AND PURCHASER SUMMONS.

This was a summons by which the vendor (the third Lord Alington) sought an order that the objections of the purchaser (the London County Council) to the title to the property sold had been sufficiently answered and that a good title had been shown.

The title to the property sold (which is referred to as "the property") stood thus: By a settlement of 1880 the property was settled to such uses as the first Lord Alington and the second Lord Alington should jointly appoint, and in default of such appointment to the use of trustees for a term of 200 years, with remainder to the use of the first Lord Alington for life, with remainder to the use of the second Lord Alington for life, with remainder to his first and other sons in tail male, with remainders over. The trusts of the term of 200 years were to raise a sum of 35,000*l.*, of which the whole had been raised except a sum of 8750*l.*, which remained charged under a deed poll of 1890. It was further provided that the second Lord Alington should have power to charge the property with a jointure not exceeding 4000*l.* a year in favour of any wife of his, and to secure such jointure by limiting the property for any term of years. Viscount Somerton and Anthony Ashley were the trustees of the settlement with power of sale. By a settlement of 1883 the second Lord Alington charged the property with the payment to his wife during widowhood of a yearly rentcharge (after the death of the first Lord

Alington) of 4000*l.* By a deed of 1891 the property was exonerated from the jointure rentcharge of 4000*l.* The first Lord Alington died on February 17, 1904.

By a disentailing deed of 1914 the property was assured to such uses as the second Lord Alington and Gerard Sturt should jointly appoint, and in default of appointment to the use of the second Lord Alington for life in restoration of his life estate under the settlement of 1880, with remainder to the old uses subsisting immediately before the execution of such disentailing deed.

Gerard Sturt died a bachelor in 1918, and the second Lord Alington died on July 30, 1919. Thereupon the vendor as his only surviving son became tenant in tail male in possession of the property. By an order of the Chancery Division dated March 1, 1920, Lord Wolverton and Charles Montagu (who were then trustees of the settlement of 1880) were appointed trustees for the purposes of the Settled Land Acts, 1882 to 1890, of the compound settlement constituted by the settlement of 1880, the settlement of 1883, the deed of 1891, a deed of February 8, 1892, a settlement of February 9, 1892, and the disentailing deed of 1914, or any two or more of them. By a deed of 1923 Lord Hillingdon was appointed a trustee of the settlement of 1880 and of the above mentioned compound settlement in the place of Charles Montagu and jointly with Lord Wolverton. By a disentailing deed of 1924 the property was assured to the use of the vendor in fee simple subject to all charges and incumbrances affecting the same. By a deed of 1925 the yearly rentcharge of 4000*l.* was charged upon the property. This, in the events which happened, was the document which created that charge. By a vesting deed of 1926 it was declared that the property was vested in the vendor in fee simple and that he should stand possessed thereof upon the trusts and subject to the powers and provisions upon and subject to which, under the compound settlement there described or otherwise, the same ought to be held from time to time, and that Lord Wolverton and Lord Hillingdon were the trustees of such compound settlement for the purposes of the Settled Land Act, 1925.

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The compound settlement was described as consisting of various specified documents, being the documents specified in the said order of the Chancery Division with the addition of the disentailing deed of 1924, and the deed of 1925.

Topham K.C. and *J. V. Nesbitt* for the vendor. Immediately before the Settled Land Act, 1925, came into operation this property was settled land. The words in s. 2, sub-s. 1, of the Act of 1882, "stands for the time being limited to or in trust for any persons by way of succession," include the case of a jointure and portions, even though presently payable, and the terms of years limited to trustees to secure them: *In re Mundy and Roper's Contract.* (1) It may be doubtful if that decision covers the case of a fee simple with existing charges, but *In re Campbell* (2) is decisive on the point. The case is material, because the definition of settlement for the purpose of settlement estate duty is given by reference to s. 2 of the Settled Land Act, 1882, and the inquiry to which the Court had to direct its mind was whether any property did by the will of the testator stand limited to persons by way of succession. There Stirling L.J., following the decision in *In re Mundy and Roper's Contract* (1), that the words of the Act included the case of portions and jointures limited to arise on the death of a tenant for life, said that he entirely agreed with the observations of Chitty L.J. in that case—namely, "if succession is not to be treated as a technical or artificial term, if the substance of the thing is to be considered, it appears to me impossible to say here that in truth upon the death of each annuitant in this case the residuary devisees do not succeed to the property." In the case of *In re Trafford's Settled Estates* (3) the estates stood limited to the applicant in fee simple, but the will contained a charge of subsisting annuities on the estates, and Warrington J. said that it was sufficient to create a compound settlement that there should be still under an earlier instrument such an interest as a jointure rentcharge,

(1) [1899] 1 Ch. 275. (2) [1902] 1 K. B. 113, 123.
(3) [1915] 1 Ch. 9.

although not secured by a term. *In re Campbell* (1), a decision of the Court of Appeal, was not cited to Romer J. in *In re Earl of Carnarvon's Highclere Settled Estates.* (2) It is submitted that that case ought not to be followed. In the alternative, by s. 3 of the Settled Land Act, 1925, either the settlement of 1880, or the compound settlement constituted by the settlements of 1880 and 1883, is deemed to be an existing settlement so long as any charge or power of charging under the settlement exists. At all events the settlement of 1880 is revived by s. 3 and becomes under the Settled Land Act, 1925, part of a compound settlement constituted by the settlement of 1880, the disentailing deeds of 1914 and 1924, and the deed of 1925. Then ss. 31 and 33 of the Settled Land Act, 1925, make the trustees under the old Settled Land Act trustees of that settlement for the purposes of the new Act. There is therefore no need for the appointment of new trustees under s. 34.

Stamp for the purchaser. The question whether this land was settled land under the old law depends on s. 2 of the Settled Land Act, 1882, which declares that any instrument, or any number of instruments, under which any land, or any interest or estate in land, stands limited to persons by way of succession is a settlement, and that land which is the subject of a settlement is settled land. Then by s. 2, sub-s. 4, the determination of the question of whether land is settled land is governed by the state of the facts, and the limitations of the settlement at the time of the settlement taking effect. In the case of *In re Marquis of Ailesbury and Lord Iveagh* (3) there was executed on July 16, 1885, an instrument under which the Savernake estate became limited to various persons by way of succession, and on that day the instrument took effect. The conveyance of the tenant for life could override the jointure by reason of s. 20, sub-s. 2, of the Settled Land Act, 1882, because it arose under one of the documents constituting the settlement of the Savernake estate. By s. 2, sub-s. 4, those documents had to be ascertained

(1) [1902] 1 K. B. 113. (2) [1927] 1 Ch. 138.
(3) [1893] 2 Ch. 345.

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at the date when the settlement took effect—namely, on July 16, 1885. At that date the tenant for life in possession derived his life interest from the exercise of the joint power of appointment created by the deed of February 11, 1796, and therefore that document and all subsequent documents were included in the compound settlement of the estates. The jointure therefore did not arise under a settlement which had spent itself at the critical date—namely, the date at which the successions were created, but under the very settlement which was then operative—namely, that created by documents beginning in 1796 and ending in 1885. *In re Mundy and Roper's Contract* (1) and *In re Trafford's Settled Estates* (2), which purport to be based on the decision in the *Ailesbury* case, disregard the fact that it was founded on the finding that the jointure there arose under one of the very documents which at the critical date limited the life interest then subsisting, that is, which then constituted the settlement, and that not because the jointure arose under it but because one of the life interests arose under it. It was not a case such as this, where land which has ceased to be settled land is being once more brought into settlement. When there is no longer any person with powers under the Act such as the power to sell, lease, or manage, then the settlement under the Act ceases to exist.

In re Campbell (3) does not decide that where there is a fee simple with a jointure charged on the land that a settlement is created within the meaning of the Settled Land Act, 1882. In that case the whole estate was by will made chargeable with the annuity. If the whole estate had been less than what was required to produce the annuity, then the whole estate would have been charged. The annuity and the fund to produce it was settled, but the whole estate was not settled on persons by way of succession. The case does not decide that the property not required for providing the annuity is settled property either for settlement estate duty or under the Settled Land Acts.

(1) [1899] 1 Ch. 275. (2) [1915] 1 Ch. 9.
(3) [1902] 1 K. B. 113.

In re Earl of Carnarvon's Highclere Settled Estates (1) applies my argument, and Romer J. arrived at the conclusion that at the time when the Act of 1925 came into operation, that is to say under the old law, the land was not settled land, but was merely land vested in somebody in fee simple subject to an existing family charge. It is submitted that the same is the case here. At one time there was a series of limitations to persons in succession which constituted the settled land for the purposes of the 1882 Act, but they came to an end before the 1925 Act came into operation. There happened to be in the same document a charge of jointures and portions on account of which this land is settled land and a settlement exists under the Settled Land Act, 1925. It is submitted that those are separate settlements, arising under different Acts at different dates, and the trustees of the one are not ipso facto the trustees of the other. Trustees for the purposes of the Settled Land Act must be appointed by the Court under s. 34. In s. 3 the words "land which has been subject to a settlement" mean land so subject since the passing of the Settled Land Act, 1924. The Act does not revive powers and duties which are extinct, the section is directed to the future.

Cur. adv. vult.

June 2. RUSSELL J. When the Settled Land Act, 1925, came into operation, namely, on January 1, 1926, the property was vested in the vendor in fee but subject to two family charges which were interests vested in possession—namely, first, the sum of 8750*l.* secured by the term of 200 years limited by the settlement of 1880, and, second, the jointure rentcharge of 4000*l.* which was originally charged by the settlement of 1883 in exercise of the power contained in the settlement of 1880, but which was subsequently transferred to other lands exclusively, and ultimately reimposed upon the property by the deed of 1925.

The property is now settled land under the Settled Land Act, 1925, but the question arises whether if the sale goes

(1) [1927] 1 Ch. 138, 155.

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through and the purchase money is received by the existing trustees, Lord Wolverton and Lord Hillingdon, the purchaser will get a good title to the property discharged from all claims in respect of the 8750*l.* and the 4000*l.* jointure rentcharge.

The vendor says "yes." The purchaser asserts "no." The vendor puts his case in two ways: first, he contends that under the old law the property was at the relevant moment immediately before the new Act came into operation, settled land; second, if wrong on that point, he says that by s. 3 of the Settled Land Act, 1925, the old settlement of 1880, or the compound settlement constituted by the settlements of 1880 and 1883, is deemed to remain on foot. Or, at all events, the old settlement of 1880 was a dormant settlement capable of being awakened by the embrace of s. 3 and made under the new law part of a compound settlement of which the other constituents would have to be the settlement of 1883, the disentailing deed of 1914, the disentailing deed of 1924, and the deed of 1925. He further says that the old Settled Land Act trustees or their successors, Lord Wolverton and Lord Hillingdon, are trustees of that settlement for the purposes of the Settled Land Act, 1925—this by virtue of ss. 31 and 33 of that Act.

On the other hand, the purchaser contends that the property was not, at the relevant moment, settled land within the meaning of the old Settled Land Acts. The settlement had come to an end, and although the new Act made the property settled land within the meaning of that Act, the trustees for the purposes of the old Acts of the settlement which had formerly existed under those Acts are not trustees for the purposes of the Settled Land Act, 1925, of the settlement which is brought into existence by that Act. Trustees of that settlement for those purposes must be appointed by the Court under s. 34.

He further contends that s. 3 of the Settled Land Act, 1925, has no application to the present case. The section is not retrospective; it only applies in futuro, that is, to land which since the Act has been subject to a settlement; or that if the section applies to a state of things before the

Act, it only applies to land which has been continuously subject to a settlement. As regards the first point, the question is covered by the decision of Romer J. in *In re Earl of Carnarvon's Highclere Settled Estates.* (1) I was invited to disregard that decision because of two other authorities—namely, *In re Campbell* (2), which was a decision of the Court of Appeal on settlement estate duty, and *In re Trafford's Settled Estates* (3), a decision of Warrington J. *In re Campbell* (2) was not cited to Romer J., but when that case is looked at all that it decided was that where a fund was set aside out of a mixed residue to provide by the income thereof certain annuities, upon the cesser of which the persons entitled to residue would be entitled to the fund, settlement estate duty was payable on so much of the residue as had been set aside. It was held that the fund was limited in trust for persons by way of succession. That decision does not justify the proposition that the existence of a jointure charged on an estate vested in an owner in fee made, under the old law, the estate a settled estate. If it did the whole of the residuary estate would have been subject to settlement estate duty. I must further point out that Stirling L.J. carefully confines the decision to the case of a fund being set aside to provide an annuity, and keeps open the case of a simple gift of an annuity where there is no trust for its payment out of a particular fund. As regards *In re Trafford's Settled Estates* (3), it was suggested that although cited to Romer J. he never considered the effect of the decision of Warrington J. on the second branch of the case. This may be the case, although I doubt it; but however that may be, there seems to me to be considerable force in Mr. Stamp's criticism—namely, that the decision is not justified by *In re Mundy and Roper's Contract* (4) (which was the case of a fee simple and a reversionary portion), but is founded on a questionable view of the facts and decision in *In re Marquis of Ailesbury and Lord Iveagh.* (5) In any event, *In re Trafford's Settled*

(1) [1927] 1 Ch. 138.
(2) [1902] 1 K. B. 113.
(3) [1915] 1 Ch. 9.
(4) [1899] 1 Ch. 275.
(5) [1893] 2 Ch. 345.

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Estates (1) is a decision of a Court of co-ordinate jurisdiction, and I prefer to follow the careful judgment of Romer J., which is the most recent judgment upon the point. I may further point out that the recent decision of the Court of Appeal in *In re Ryder and Steadman's Contract* (2), that para. 1 (2.), Part IV., Sch. I., of the Law of Property Act, 1925, applied to the case before them, appears to be consistent only with the view that the decision in *In re Carnarvon* was correct.

The second point next arises for consideration. I see no reason for limiting s. 3 of the Settled Land Act, 1925, in the manner suggested on behalf of the purchaser, that is to say, by reading it as only referring to land which since the Act has been subject to a settlement, or to land which has been continuously subject to a settlement. To do so would be to depart unnecessarily from the ordinary meaning of the words used. If I read the words in their ordinary sense this case seems to fall within the section.

The land has been subject to a settlement. Before the execution of the disentailing deed of 1924 the property was subject to a settlement—namely, the compound settlement constituted by the documents mentioned in the order of the Chancery Division, or some of them. The 8750*l.* is a charge under that settlement, which charge still subsists; therefore that settlement is, by s. 3, to be deemed a subsisting settlement for the purposes of the Settled Land Act, 1925. Lord Wolverton and Lord Hillingdon as trustees of that settlement for the purposes of the old Settled Land Acts are, under s. 31, trustees of it for the purposes of the Settled Land Act, 1925; and a receipt by them of the purchase money would free the land sold from the 8750*l.* But the 4000*l.* jointure is not created under that compound settlement. It is created by the deed of 1925. Here, however, it seems to me that s. 31 comes to the rescue. The trustees being trustees of the compound settlement above mentioned, which is deemed to be a subsisting settlement for the purposes of the Settled Land Act, 1925, are, by s. 31, made trustees

(1) [1915] 1 Ch. 9. (2) Ante, p. 62.

for the purposes of that Act of any settlement constituted by that compound settlement and any instrument subsequent in date or operation, which would include the disentailing deed of 1924, and the deed of 1925. Nor is it any objection that the power of sale in the settlement of 1880 has come to an end, because under s 3 so long as the compound settlement referred to in the order of the Chancery Division is deemed to be subsisting Lord Wolverton and Lord Hillingdon, being, by virtue of the Act, constituted trustees of the settlement, which includes the deed of 1925, remain and are trustees of that settlement for the purposes of the Settled Land Act, 1925.

The result is that in my opinion the property is subject to a compound settlement constituted by the settlement of 1880, the disentailing deed of 1914, the disentailing deed of 1924, and the deed of 1925, and that Lord Wolverton and Lord Hillingdon are, by the Settled Land Act, 1925, constituted trustees of that settlement for the purposes of that Act. Upon receipt by them of the purchase money the property in the hands of the purchaser will be free from the 8750*l.* and the 4000*l.* jointure rentcharge.

An order will be made as asked in the summons, and the purchaser must pay the costs.

Solicitors: *Nicholl, Manisty & Co.: T. Bullivant.*

J. B. B. M.

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June 23, 24; *July* 7.

In re LANYON.

LANYON *v.* LANYON.

[1927. L. 548.]

Will—Construction—Residuary Estate—Income to Son for Life—Remainder to his Children, provided he did not marry a Relation by Blood—In the Event of his marrying a Blood Relation, then upon certain other Trusts—Condition not void for Uncertainty—Void as being in Restraint of Marriage.

The testator, by his will, directed that his trustees should stand possessed of his residuary estate upon trust to pay the income to his son, J. L., for his life, and on his decease upon trust to pay the capital to his child or children and equally between them if more than one, provided J. L. "does not marry a relation by blood, as I wish to mark my great objection to marriage between blood relations. And in the event of my son not leaving a child or children surviving him who shall live to attain the age of twenty-one years, or in the event of his marrying a blood relation," then upon certain other trusts. The testator died on June 18, 1924:—

Held, that the condition, although in terms only a partial restraint on marriage, was of such a nature that it would lead to the probable prohibition of marriage, and was void accordingly.

J. L. could contract no marriage with a supposed stranger, except subject to the risk that should a common ancestor be traced, the provision for defeasance would operate. He could only be certain that he was marrying a blood relation, he could never be certain that he was not.

By his will dated June 15, 1922, the testator, after giving certain annuities, directed that his trustees should stand possessed of his residuary estate upon trust to pay the income to his son, the defendant, James Lanyon, for his life, and on his decease upon trust to pay the capital to his child or children and equally between them if more than one, "provided he does not marry a relation by blood, as I wish to mark my great objection to marriage between blood relations And in the event of my son not leaving a child or children surviving him who shall live to attain the age of twenty-one years, or in the event of his marrying a blood relation," then upon certain other trusts. The testator died on June 18, 1924.

This summons was taken out by the trustees of the testator's will, and it asked: (1.) That it might be determined

what persons or classes of persons were, upon the true construction of the will, "relations by blood" or "blood relations" of the defendant, James Lanyon; (2.) that it might be determined whether the gift over in the event of his marrying a "blood relation" (*a*) was void altogether, (*b*) would in that event determine the defendant's life interest in the residuary estate, or (*c*) would in that event operate so as to defeat the estates of the issue (if any) of the defendant by any marriage he might contract other than the marriage so contracted by him with a "blood relation" as well as the issue (if any) of such marriage.

Rawlence for the trustees.

Farwell K.C. and *C. E. Harman* for the defendant, James Lanyon. The condition under which the estate is forfeited is void for uncertainty. The Court cannot with sufficient certainty determine who is included in the class of blood relations. The defendant is entitled to know with certainty at all times what his position is. A condition which may operate to divest an interest given by a will must be certain. It must be such a limitation that at any given moment of time it is ascertainable whether the limitation has taken effect, otherwise the condition is void: *In re Viscount Exmouth* (1); *In re Sandbrook.* (2) Blood relations do not embrace a larger class than relations. All men are blood relations of all other men if descended from a common ancestor: *In re Patterson* (3); Jarman on Wills, 6th ed., vol. ii., p. 1627. It is perfectly settled that a gift to relations is good, yet that is very indefinite. It may extend in infinitum, and therefore the Court on the ground of convenience in such cases adopted the rule of the Statute of Distributions, and though where a power of selection is given the donee of the power may go beyond that rule, it is adhered to wherever the duty devolves on the Court: *Cruwys* v. *Colman* (4); *Wilson* v. *Duguid.* (5)

(1) (1883) 23 Ch. D. 158, 164.
(2) [1912] 2 Ch. 471.
(3) [1899] 1 I. R. 324.
(4) (1804) 9 Ves. 319, 323.
(5) (1883) 24 Ch. D. 244, 251.

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Bennett K.C. and *Harold Christie* for residuary legatees. A power may be exercisable among a class so wide that it is difficult to ascertain who would fall within the class, and then it is void. Here it is easy to ascertain the class. The question whether a condition in restraint of marriage is valid or invalid is dealt with in Jarman on Wills, 6th ed., p. 1525 et seq. In *Perrin* v. *Lyon* (1) a condition that the legatee should not marry a Scotchman was held to be valid. The ground of that decision was that a condition to be invalid must be in general restraint of marriage.

The meaning of blood relation must be that there has been at any time a common ancestor. The difficulty is to prove this one way or the other.

In *Jenner* v. *Turner* (2) the condition was that the legatee should not marry a domestic servant or any one who had at any time been a domestic servant. That class was very large, very uncertain, and very difficult to ascertain, yet the condition was held to be valid. In *Hodgson* v. *Halford* (3) a condition against marrying any one other than a Jew was held to be valid. The whole point is that a condition to be void must be a condition too vague to be enforced by the Court: see Parker J. in *In re Sandbrook*. (4)

Farwell K.C. in reply. In *In re Bathe* (5) Eve J. would have held the condition void if the names of the ladies had been impossible to discover. Here it would be impossible to ascertain whether any given person was within the class or not, therefore the condition is in general restraint of marriage, and is void.

Cur. adv. vult.

July 7. RUSSELL J. The son is anxious to have his position clearly defined. He is a bachelor, aged thirty-seven. He not unnaturally wishes to know: (1.) whether, if he did knowingly or unknowingly marry a blood relation, he would lose his life interest; and (2.) whether the provisions of the

(1) (1807) 9 East, 170.
(2) (1880) 16 Ch. D. 188.
(3) (1879) 11 Ch. D. 959.
(4) [1912] 2 Ch. 471, 477–8.
(5) [1925] Ch. 377.

will in regard to his marrying a blood relation are void, or whether his future choice of a bride is to be fettered by the risk of a subsequent discovery that he and his wife had a common ancestor who (say) landed in Pevensey Bay with William the Conqueror.

As to the first question I feel no difficulty. The proviso appears to be in no way annexed to the gift of his life interest. It and the gift over in the event of his marrying a blood relation are included in and apply only to the trusts declared to take effect on his decease. The result is that if the provisions are valid in law they only operate to defeat the interest of children of James Lanyon, not to defeat his life interest.

The second question is more difficult. The meaning of blood relationship seems clear enough. It cannot here refer to statutory next of kin. In my opinion it describes the relationship existing between two or more persons who stand in lawful descent from a common ancestor. The chain of descent may be broken by illegitimacy, but with that qualification all persons descended from a common ancestor, however remote, are blood relations. Indeed this was conceded on both sides, and the case was argued on that footing.

The first argument on behalf of the son ran thus: That the proviso and condition are intended to defeat the vested interests previously given to the children. That in order to be valid such a provision must be of such a nature that it must be possible at any given time to know its limits, and to know whether there has in fact been a breach of the condition or not. That in the present case it is impossible for the son at any given time to know the limits of the provision, or to be sure that any person whom he marries is not a blood relation. The authorities cited in support of these contentions were *Clavering* v. *Ellison* (1); *In re Viscount Exmouth* (2); and *In re Sandbrook*. (3)

Before considering these cases, I would point out that I can see no difficulty in knowing the limits of the provision

(1) (1856) 3 Drew. 451; (1857) 8 D. M. & G. 662; (1859) 7 H. L. C. 707.
(2) 23 Ch. D. 158.
(3) [1912] 2 Ch. 471.

RUSSELL J. —the limits are marriage with a blood relation; but I agree that if the son married some one believed to be in no degree of relationship to him, he could not, as a general rule, be absolutely certain that his bride was not in fact a blood relation. Turning now to the cases cited, they do not in my opinion support the proposition in question. They do support this proposition, that such a provision must indicate in clear terms what the event is upon which the defeasance of a vested estate is to take effect. There must be no room for uncertainty on that score. They do not however establish the proposition that difficulty in ascertaining whether the defined event has or has not occurred will render the provision void for uncertainty.

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In *Clavering* v. *Ellison* (1) the provision for defeasance ran thus: "And in case any one or more of such children shall be educated abroad, or not in the Protestant religion according to the rites of the Church of England." It has two branches. For this purpose the important one was the first, because as to the second branch all the judges agreed that upon the evidence, its event had not happened. The question of its validity was not discussed. As regards the education branch, its validity was discussed. In the Court below Kindersley V.-C. (as I read his judgment) held it to be invalid and inoperative on the ground that the contingency was not expressed in such terms as to enable the Court to say what the event was upon which the defeasance was to take place. He says (2): "The contingency should be so expressed as not to leave it in any degree doubtful or uncertain what the contingency is which is intended to defeat the prior estate," and after analysing the particular facts in regard to each child to illustrate the impossibility of attaching a clear meaning to the words "educated abroad," he finds (3) the clause to be inoperative on the ground of uncertainty. On appeal (4) the Lords Justices took the view that no breach had occurred. Knight Bruce L.J. assumed validity in the appellant's favour, and was apparently of opinion (but I

(1) 3 Drew. 451, 454.
(2) 3 Drew. 470.
(3) 3 Drew. 480.
(4) 8 D. M. & G. 662.

think erroneously) that Kindersley V.-C. had also assumed validity.

In the House of Lords (1), Lord Campbell considered that neither condition was void, but held that neither condition had been broken. Lord Cranworth held that the first branch was void for uncertainty. He says (2): "Where a vested estate is to be defeated by a condition on a contingency that is to happen afterwards, that condition must be such that the Court can see from the beginning, precisely and distinctly, upon the happening of what event it was that the preceding vested estate was to determine." Later he says (3): "I think that, looking at the language here used, it is far too indefinite and uncertain to enable the Court to say what it was that the testator meant should be the event on which the estate was to determine." Lord Kingsdown merely concurred in the propriety of the decision that the decree below should be affirmed.

In *In re Viscount Exmouth* (4) Fry J. held the clause there in question to be void for uncertainty, and he used the following language: "The condition must be clear and certain. That, in my opinion, includes, not only certainty of expression in the creation of the limitation, but also certainty in its operation. It must be such a limitation that, at any given moment of time, it is ascertainable whether the limitation has or has not taken effect." And again, after citing the passage already cited by me from Kindersley V.-C., he adds (5): "No doubt there the want of certainty was rather in the expression used than in the ascertainment of the operation of the limitation. But it is quite plain certainty in the one is as essential as certainty in the other."

The meaning of the words "certainty in the operation of the limitation" are not at first sight quite clear. They become clear, I think, when the nature of the provision in that case is looked at. They do not, I think, mean that the person affected must be in a position at all times to know whether

(1) 7 H. L. C. 707.
(2) 7 H. L. C. 725.
(3) 7 H. L. C. 726.
(4) 23 Ch. D. 158, 164.
(5) 23 Ch. D. 165.

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he is committing a breach of a provision the nature of which is clearly expressed. The want of certainty in the operation of the limitation here in question was this: The clause postponed the vesting of an absolute interest in chattels till the expiration of a term of twenty-one years to commence from the decease of all such persons as should be living at the testator's death, and should at any time after the testator's death attain the title of Exmouth. The result was that you could never tell at any time who was entitled to the chattels, because until all persons (and there were several) who were alive at the testator's death and who might succeed to the title, were actually dead, you could never say whether the term of twenty-one years had commenced to run, was still current, had expired or had not commenced to run. The matter was one of absolute impossibility.

In *In re Sandbrook* (1) the provision for defeasance was to take effect (so far as relevant) if, at any time before a fixed date, one or both of two grandchildren should live with or be or continue under the custody, guardianship or control of their father, or be in any way directly under his control. Parker J. held (for the reasons given by him) that he could not arrive with certainty at any conception of the event which would cause the forfeiture, and that therefore on the authority of *Clavering* v. *Ellison* (2) the provision was void because it was so vague. Here again it was the uncertainty in the description of the event causing the defeasance which avoided the provision.

In the case before me, the prescribed event is quite clear, but it is sought to avoid the clause, because it is said that it is difficult and probably impossible for the son to ascertain whether a particular marriage will be or has been a breach of the provision. The authorities cited do not in my opinion justify me in declaring the provision to be void on that ground.

Let me now consider the proposition on general principles. It is open to a testator to make, within legal limits, any disposition of his property, however unreasonable or whimsical it

(1) [1912] 2 Ch. 471. (2) 7 H. L. C. 707.

may appear to others. He may, within perpetuity limits, take property away from A. and give it to B. upon the happening of an event. But the event must be clearly defined, and must not violate considerations of public policy.

The son seeks to add another qualification to a testator's right to dispose of his property—namely, that the event must be of such a nature that at any point of time, limited for its occurrence, it must be possible to know whether it has occurred or not. I am not aware of any legal principles upon which I am at liberty so to hold.

In the case before me the very difficulty which the son may have in ascertaining that he and his bride do not trace legal descent from a common ancestor, will affect the persons on whom will be the onus of proving that the specified event has happened. If the difficulty amounts to impossibility the defeasance can never operate. If the defeasance ever does operate, then it can only be because it was not impossible, but was possible to know within the limited time whether the event had occurred or had not occurred.

In my opinion, although uncertainty as to what is the prescribed event upon which a defeasance is to occur will avoid the provision for defeasance, it is impossible to hold that because it may be uncertain from time to time whether a clearly defined event has or has not occurred, the provision is void.

The second argument presented on behalf of the son was that the provision for defeasance was void on grounds of public policy as being in restraint of marriage. By the laws of this country the doctrine of the Civil Law which avoided all conditions in wills restraining marriage has not been adopted. Many such conditions have been held valid. Thus in *Perrin* v. *Lyon* (1) a condition against marriage with any person born in Scotland or born of Scotch parents was held good. In *Hodgson* v. *Halford* (2) a clause was upheld which provided for forfeiture in the event of marriage with a person who did not profess the Jewish religion, or was not born a Jew. In *Jenner* v. *Turner* (3) a condition for defeasance

(1) 9 East, 170. (2) 11 Ch. D. 959.
(3) 16 Ch. D. 188.

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in the event of marriage with a domestic servant or a person who had been a domestic servant was held valid. It was pointed out that the whole female world (except only domestic servants) was open as a field of choice. But in my opinion all partial restraints of marriage are not necessarily valid because they are partial only. It is not enough to say that a particular restraint is not a general restraint, but leaves open a field of choice and is therefore valid. Considerations of public policy require more than that. It still remains to be considered in each case whether the particular restraint is reasonable—reasonable, that is to say, from the point of view of public policy. A restraint which, although in terms partial, from its nature would or might lead in practice to a probable prohibition of marriage would in my opinion fall within the mischief which public policy requires should be prevented. This view is established by a decision of the High Court of Parliament in Ireland in the old case of *Keily* v. *Monck*. (1) The provision for defeasance there was the event of a daughter marrying a person not being at the time of marriage seised of an estate in fee or of a freehold perpetual of the clear yearly value of 500*l*. sterling. The restraint was in terms partial, but the House held the provision to be void as leading to a probable prohibition of marriage. The Lord Chancellor in his speech (which is the only one reported) used the following language (2): "If then this be a vested legacy, the condition annexed to it is clearly a condition subsequent, and the rule of the common law is, that if a condition subsequent be illegal, or impossible at the time of the gift, or become impossible by the act of God, the gift remains absolute, and the condition is void. See then whether the condition, which the caprice of old age has dictated in the present instance, can be supported in any Court of Justice. The condition is that the respondent shall not marry without the consent of her mother and Mr. Usher. This consent has been given. And further that she shall not marry any man, who shall not be seised, at the time of his marriage, of an estate in fee simple, or of freehold property of the

(1) (1795) 3 Ridg. P. C. 205. (2) 3 Ridg. P. C. 205, 260.

clear yearly value of 500*l.* over and above all incumbrances. It has been objected at the bar, that there is no precedent to be found condemning such a condition. If this argument had prevailed in Westminster Hall for the last century, that beautiful system of jurisprudence which is the best birthright of British subjects would never have been settled and established. Give me a fair and broad principle, and I never will scruple to build a precedent upon it. And therefore in this case we are only to look to the principles of the law of England, and see whether they will sustain such a condition. And upon this point I take the principle to be settled, that the law allows reasonable restraints upon marriage. But that conditions prohibiting marriage, or leading to a probable prohibition of marriage are condemned upon principles of sound and general policy. A condition in restraint of marriage, excluding men of a particular profession, has been held void: Eq. Cas. abr. p. 110. So a covenant with a woman, not to marry any other, has been held void, as leading to a general prohibition of marriage: *Lowe* v. *Peers.* (1) So *Long* v. *Dennis.* (2) A father had imposed a condition disinheriting the children of his son, and disabling him from settling a jointure on his wife, if he married a woman, not having a competent marriage portion, or without consent. Lord Mansfield, and the other judges giving judgment on that case, all declare (3): 'conditions in restraint of marriage are odious, and therefore are held to the utmost rigour and strictness. They are contrary to sound policy. Conditions precedent must previously exist, therefore in these there can be no liberality, except in the construction of the clauses.' Lord Mansfield says (4): 'the forfeiture here is so cruel as to begin with the innocent offspring of the offending son. This testator considered money as the only qualification in a wife.' It seems pretty clear from the report of this case of *Long* v. *Dennis* (2) that if it had been the case of a condition subsequent, the Court would have condemned the condition."

(1) (1768) 4 Burr. 2225.
(2) (1767) 4 Burr. 2052.
(3) 4 Burr. 2055.
(4) 4 Burr. 2056.

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Looking to the case before me the restraint is in terms partial; although no one could say how large or small a portion of the female world is left open to choice, it is still in terms a partial restraint. But its nature is undoubtedly such that it would be difficult, almost impossible, to ascertain definitely that any particular lady was not a blood relation —that a Pevensey Bay or even more remote common ancestor could not be found. No marriage with a supposed stranger in blood could be contracted except subject to the risk that should a common ancestor be traced the provision for defeasance would operate. The son could only be certain that he was marrying a blood relation, he could never be certain that he was not. A provision which by its nature produces those results is in my opinion a provision leading to the probable prohibition of marriage and is void accordingly.

There is one novel feature in this case—namely, that the penalty is inflicted not on the son who violates the provision but upon his children. No property is taken away from the son. In my opinion this makes no difference. It might well be that a provision taking away property from A. in the event of a breach of condition by B., would not operate in terrorem as regards B., if A. were a stranger. But I am clearly of opinion that where the victims are B.'s children, and the prohibited event is B.'s marriage, there is complete scope for operation in terrorem as regards B.

Solicitors: *Patersons, Snow & Co., for Hare & Son, Much Hadham; Carleton-Holmes, Fell & Wade, for Nockolds & Son, Bishop's Stortford.*

P. J. B.

pproved and Followed. Re DUKE OF ORFOLK'S WILL TRUSTS. [1950] 1 E.R. 664.

Distinguished. Re PAYTON (decd.). [1951] 2 All E.R. 425.

Distinguished. In re AUSTIN MOTOR CO.'S POLICIES [1951] Ch. 1081

ollowed. Re DUKE OF NORFOLK'S ILL TRUSTS. [1949] 2 All E.R. 701.

Followed. In re DUKE OF NORFOLK [1950] 1 Ch. 25

In re CASSEL.

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June 28, 29; *July* 14.

Approved. In re DUKE OF NORFOLK [1950] 1 Ch. 467

PUBLIC TRUSTEE *v.* MOUNTBATTEN.

[1926. C. 4676.]

Will—Imperative Trust to maintain House and its Contents—Principal Value of Property passing on Death—Estate Duty—Assessment of Duty—Apportionment of Duty between Beneficiary and Residue—Finance Act, 1894 (57 & 58 *Vict. c.* 30), *s.* 1; *s.* 2, *sub-s.* 1 (*b*); *s.* 7, *sub-ss.* 5, 7, 8.

The testator bequeathed "Brook House and contents" and the stables held therewith, the leases of which would expire in 1995, to trustees upon trust to allow Mrs. C. to have the use and enjoyment thereof for life, and after her death upon the like trust for the benefit of Lady L. for life. The testator directed: "the rent outgoings rates and taxes for the time being payable in respect of the said messuage and premises and keeping the same and the contents thereof insured against fire and burglary and in a proper state of preservation shall always be paid by my trustees out of the income of my residuary personal estate." Mrs. C., the first tenant for life of Brook House, died September 16, 1925, and was succeeded as tenant for life by Lady L.

The summons asked how the estate duty, payable on Mrs. C.'s death in respect of the benefit of the annual expenditure on Brook House, should be borne as between Lady L. and the testator's residuary estate, and how assessed:—

Held, that on the death of Mrs. C., the property which passed was the right to enjoy the benefit of the annual sum, and that the case fell within s. 1 of the Finance Act, 1894; that the principal value of the property should be ascertained under s. 7, sub-s. 5, and s. 7, sub-s. 8, the special facts of the case being taken into consideration by the Commissioners of Inland Revenue; that the duty must be borne by Lady L., but on equitable terms—namely, that it should in the first instance be borne by residue, which should be recouped by a policy on the life of Lady L. to be vested in the trustees which at her death would produce a sum equal to the duty; and that the interest on the duty and the policy premiums should be retained and paid by the trustees in each year out of the sum which would otherwise be expended by them on Brook House.

ADJOURNED SUMMONS.

The provisions of the will of the testator, Sir Ernest Cassel, are set out in *In re Cassel.* (1)

Mrs. Wilhelmina Cassel, the first tenant for life of Brook House under the will, died on September 16, 1925, and Lady Louis Mountbatten thereupon became, and now is, tenant for life of Brook House.

(1) [1926] Ch. 358.

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The summons asked: (1.) how the estate duty which became payable on Mrs. Cassel's death on account of the annual expenditure provided for in respect of Brook House by the special clause should be borne as between Lady Louis and the testator's residuary estate; and (2.) how such estate duty should be assessed. The Commissioners of Inland Revenue consented to be joined as defendants, for the purpose of being bound by the judgment on the second question.

The following matters were agreed between the parties in the course of the argument—namely, (1.) the average annual income earned by the whole estate of the testator was at the rate of 6.39 per cent.; (2.) the rate of estate duty payable in respect of Mrs. Cassel's estate was 29 per cent.; and (3.) the average annual amount of the benefit conferred by the special clause on the beneficiary for the time being entitled under the will to Brook House was 5000*l*.

Finance Act, 1894, s. 1: "In the case of every person dying after the commencement of this part of the Act there shall . . . . be levied and paid upon the principal value . . . . of all property . . . . which passes on the death of such person a duty called 'Estate Duty.'"

Finance Act, 1894, s. 2: "Property passing on the death of the deceased shall be deemed to include . . . . (*b*) Property in which the deceased or any other person had an interest ceasing on the death of the deceased, to the extent to which a benefit accrues or arises by the cesser of such interest."

Bischoff for the plaintiff.

W. Greene K.C. and *J. V. Nesbitt* for the tenant for life. Estate duty is not payable on a death in respect of any property under s. 1 of the Finance Act, 1894, unless the property has continued in existence both before and after the death. The property cannot "pass at the death" if when the death occurred it was not in existence, nor does it pass at the death if it then ceases altogether. When Mrs. Cassel died her right to the benefit of the annual sum ceased and a different, though similar thing, came into existence—namely, the right of Lady Louis Mountbatten

to the benefit of the annual sum. This case falls within s. 2, sub-s. 1 (*b*), of the Finance Act, 1894. The annual sum is charged on the whole of the residue and not on the notional sum required to produce the annuity. It is the whole residue which has derived benefit from the cesser of the annuity and the burden on the income of residue must be apportioned. The principal value, ascertained under s. 7, sub-s. 7 (*b*), is the notional sum which, at 6.39 per cent., will produce the annual sum. The estate duty is payable out of residue, but Lady Louis Mountbatten must pay the same proportion of the whole interest as the notional sum bears to the whole residuary estate including the notional sum: *In re Palmer.* (1) If this is a s. 1 case the property which passed on the death of Mrs. Cassel was the aliquot part of residue necessary to produce the 5000*l.*, about 78,250*l.*, but that is opposed to the facts, as 78,250*l.* did not pass.

Roger Turnbull for the infant daughter of the tenant for life, and *Ashton Roskill*, for Sir Felix Cassel and Mrs. Jenkins, took no part in the argument.

Maugham K.C. and *W. Hunt* for persons interested in residue. This is a case of property passing on death within s. 1. The benefit of the provision passed from Mrs. Cassel to Lady Louis Mountbatten. It is Lady Louis and not residue that benefits by the death of Mrs. Cassel. Residue still has to bear the burden of the 5000*l.* The property that passes is the benefit of this annual sum for a term of years, or the notional sum out of residue that produces that sum. If this were a perpetual annuity it would clearly be within s. 1, and there is no distinction in principle between that and one not lasting in perpetuity. If the testator had given a perpetual annuity of 5000*l.* charged on residue to A. for life with remainder to B. and A. had survived the testator so that on his death it passed to B., the fact that no special part of the residue was set aside to meet the annuity would not prevent it being property that passed. Here Mrs. Cassel's interest ceased, but the benefit of the annual sum continued: *Earl Cowley* v. *Inland Revenue Commissioners.* (2) This is

(1) [1916] 2 Ch. 391. (2) [1899] A. C. 198.

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a personal gift for the benefit of persons in succession entitled to Brook House. In other words it is a perpetual annuity to run with Brook House and comes within s. 1. Lady Louis is liable for the whole of the interest on the duty, the duty itself being paid out of residue, which should be recouped out of the 5000*l.* in such a way that at the termination of the lease of Brook House it is completely recouped. In the alternative it is submitted that the estate duty ought to be charged in respect of the value of the aliquot part of the property which at the death of Mrs. Cassel represented the residuary estate of the testator necessary to provide the 5000*l.* at the rate then earned by the whole estate, that is to say, the notional sum, and that Lady Louis must pay the whole of the interest. It is pointed out in *In re Palmer* (1) that the claim of the Crown was made under s. 2, sub-s. 1 (*b*). What has to be proved here was assumed in *Palmer's* case.

Stamp for the Commissioners of Inland Revenue. The only charging section of the Finance Act, 1894, is s. 1. Sect. 2 brings within "property passing on death" property which does not pass. Here a person has died who had an interest in property left by the testator—namely, the 5000*l.* That person's interest ceased on her death and no property passed in the strict sense, but something was brought into charge by means of s. 2. It is submitted that this is a s. 2 case to which s. 7, sub-s. 7 (*b*), applies.

Cur. adv. vult.

July 14. RUSSELL J. Dealing first with the question how the estate duty should be assessed, the point resolves itself into the question as to how the principal value (upon which the estate duty must be levied and paid) is to be ascertained; in other words, whether as regards the benefit conferred by the special clause, property passed on the death of Mrs. Cassel (so that the case falls within s. 1 of the Finance Act, 1894, by force of the provisions of that section), or whether the case falls within s. 1 only by virtue of the provisions of s. 2.

(1) [1916] 2 Ch. 391.

If I were unassisted or unimpeded by previous authority, I should have said that the case was only brought into charge under s. 1 by virtue of the provisions of s. 2. I should have thought that where a life interest in A. ceased by A.'s death, with the result that an interest in B. which during A.'s life was reversionary became an interest in possession, no property passed on A.'s death. A.'s interest merely ceases, no part of it is transferred to B., or passes to B. I should have thought that such a case fell directly within the provisions of s. 2, sub-s. 1 (*b*), and only came within the charging s. 1 by virtue of s. 2. If this were the correct view, the principal value would be ascertained under the provisions of s. 7, sub-s. 7 (*b*), upon what is sometimes called the slice theory. That is to say, the principal value would be the capital sum which at 6.39 per cent. would produce 5000*l.*, say 78,250*l.* The estate duty would be payable out of the residuary estate, but a portion of the interest thereon would be borne by the person for the time being entitled to the benefit of the special clause. Such person would bear the same proportion of the whole interest as the 78,250*l.* bears to the value of the whole residuary estate including the 78,250*l.* That is to say, the 5000*l.* per annum applicable under the special clause would be reduced by that amount of interest accordingly. This method of apportioning the burden of the estate duty would be in accordance with the decision of the Court of Appeal in *In re Palmer*. (1)

This indeed was the contention before me of counsel for the Commissioners of Inland Revenue, who definitely contended that in the ordinary case of property settled on A. for life with remainder to B. estate duty was leviable on A.'s death not under s. 1 simpliciter but under s. 1 by virtue of s. 2. In other words, such a case was a s. 2 case and not a s. 1 case; it was a s. 2 case to which s. 7, sub-s. 7 (*a*), was applicable. On this footing it was argued that the case before me was a s. 2 case to which s. 7, sub-s. 7 (*b*), applied.

As I have before indicated, this view appeals strongly to me if I am at liberty to adopt it. It is said, however, on the

(1) [1916] 2 Ch. 391.

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other side that I am not free to adopt this view; that upon the death of Mrs. Cassel property passed within the language of s. 1, and that s. 2 never comes into play at all; and this on the authority of the House of Lords in *Earl Cowley* v. *Inland Revenue Commissioners.* (1) I have carefully considered *Cowley's* case, and in my opinion it prevents me from holding that the present case is not a s. 1 case, but a s. 2 case. In *Cowley's* case a tenant for life had died, with the result that the tenant for life in remainder had become tenant for life in possession. The main question for decision was whether estate duty was payable upon the gross value of the settled estate without deducting the amount of sums previously raised by mortgages of the fee. It was held that the amount of the mortgages must be deducted on the ground that the property which passed to a new tenant for life was the equity of redemption in the entire estate. Some of the Lords concerned in that decision dealt with the case on the alternative footings of s. 1 and s. 2, arriving on either view at the same result; but they all, I think, took the view that the case fell under s. 1 and not under s. 2. Lords Halsbury, Macnaghten, Morris, Shand and Davey clearly said so. If this be so, then s. 2 would not come into consideration. To borrow Lord Macnaghten's language the provisions of s. 2 "do not . . . . refer to the cesser of an interest in property which passes, but to the cesser of an interest in property which does not pass." I feel constrained to hold that the present case falls within s. 1.

What then is the property which passes on Mrs. Cassel's death? In my opinion the true answer is the benefit of the annual sum payable under the special clause. I have already in my previous judgment (2) indicated the nature of this provision. Its duration is for a term which must expire in 1995. It may expire earlier if Brook House is sold; but in view of the benefits conferred by the special clause this event, though possible, is improbable. In substance, the trustees are bound for a period of time to apply an annual sum of varying amount for the benefit of the person for the time

(1) [1899] A. C. 198, 213. (2) [1926] Ch. 358.

being entitled under the will to the enjoyment of Brook House and contents. What passes is the right to enjoy the benefit of that annual sum. That is the property which passed on the death of Mrs. Cassel.

Next, how is the principal value of that property to be ascertained? The machinery provided by the Act is s. 7, sub-s. 5, supplemented to some extent by s. 7, sub-s. 8. That machinery does not exactly fit the present case, because from the personal nature of the provision, the benefit of it could not be sold at all; an outside purchaser would not obtain delivery of the goods. Nevertheless, the machinery must be made to fit, and I think it can be made to fit. It was made to fit in the Irish case of *Attorney-General* v. *Jameson*. (1) The value cannot be ascertained by reference to market price, because there can be no market. But a hypothetical market price at Mrs. Cassel's death could be fixed by ascertaining the value of the 5000*l*. per annum over the unexpired period of the special clause. This value should not be the full value, for the owner of Brook House does not receive the annual sum, she only enjoys the benefit of payments made in respect of her property, all of which do not necessarily represent payments which she would otherwise have made out of her own pocket. To some extent, therefore, the full value would be in excess of the true value. Further, there is always a possibility of the special clause ceasing to operate before 1995 in the event of Brook House being sold. There should, I think, be no difficulty in the Commissioners taking all these matters into consideration and forming a fair opinion of the principal value, subject of course to the right of appeal given by the statute.

Having ascertained the principal value on the above footing, the first question raised by the summons then arises. I must here proceed on general principles. Various suggestions were made before me. It would, I think, be wrong to say that the present tenant for life must herself pay the duty out of her own pocket. The duty at 29 per cent. must

(1) [1905] 2 I. R. 218.

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obviously be a large sum ; and her period of enjoyment of the benefits of the special clause might not be sufficiently prolonged to recoup to her the disbursement. On the other hand, residue has not benefited by the death of Mrs. Cassel. The charge on residue continues throughout the duration of the term. The death of Mrs. Cassel has not reduced or diminished the burden. Accordingly in my opinion residue should not permanently bear any part of the burden. The burden must be borne by the person to whom the property has passed—but upon equitable terms. The extent of her burden should be made as far as possible payable out of and commensurate with her benefit. This can, in my opinion, be properly achieved in the following manner : Let the amount of the estate duty be raised and paid out of the residuary estate. Let a policy of assurance be effected on the life of Lady Louis to cover the amount of such duty, and let that policy of assurance be assigned to the trustees. Let the interest on the amount of the duty and the premiums on the policy be retained and paid by the trustees out of the annual sum which would otherwise be payable under the special clause. The result will be that on the death of Lady Louis residue will be fully recouped and she will have borne the burden of the duty to the extent of the annual diminution of her benefit under the special clause.

Before parting with the case I must say a word about *In re Palmer*. (1) It was urged that this case was in both its aspects governed by that decision. In many respects the two cases resemble each other, and if I had been able to hold here that this was a s. 2 case I should have applied *In re Palmer*. (1) But in *In re Palmer* (1) the question as between ss. 1 and 2 was not before the Court. The Inland Revenue was not represented. The question was simply this—how as between the persons interested in residue was the burden of the estate duty already paid as on a s. 2 case to be borne ? The hands of the Court were tied to that extent. The case had to be treated on the footing of s. 2 being the section to be considered, and not s. 1.

(1) [1916] 2 Ch. 391.

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In the result, I make the following declarations :—

1. Declare that the estate duty ought in the first instance to be borne by residue, and that residue should be recouped by means of a policy of insurance on the life of Lady Louis to be vested in the trustees securing payment at her death of a sum equal to the amount of the duty, the interest (1) on the amount of the duty and the policy premiums being retained and paid by the trustees in each year out of the sum which would otherwise have been applied by them under the special clause.

2. Declare that such duty ought to be charged upon the principal value (to be ascertained under s. 7, sub-ss. 5 and 8, of the Finance Act, 1894) of the right to enjoy, for a period expiring at the latest on September 29, 1995, the benefits conferred by the special clause.

Solicitors : *Norton, Rose & Co.; Nicholl, Manisty & Co.; Solicitor to Inland Revenue.*

J. B. B. M.

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May 17, 19.

In re WILLIAMS.

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[1927. W. 258.]

Charity—Charitable Gift—Will—Construction—Bequest to assist Education of Candidates for Holy Orders in Church of England—Power for Trustees to change Object if Interests of Church better Served.

A testator, who died in 1924, by his will, wherein he described himself as a Clerk in Holy Orders, gave all his property to the Public Trustee upon trust for investment. He then directed that the income (subject to the amounts thereinafter mentioned) should be paid to the Bishops of the dioceses of St. David's and Bangor, the Rector of L. and the vicars of two other parishes and their successors, together with a layman appointed by the conference of each of those dioceses, whom he nominated administrative trustees. After stating that his wife left her interest in certain property to him to be used as he wished, but for preference for Church purposes, the testator, in expressed accordance with her wish, by clause 3 of his will, devised all he should die possessed of as a fund for assisting the education of candidates for Holy Orders

(1) All parties agreed that the rate of interest should be 5 per cent. as from the date of Mrs. Cassel's death.

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in the Church of England, to be administered by the trustees. Then followed gifts of the testator's books and furniture and directions for the payment by the Public Trustee out of income, before the remainder was paid to the administrative trustees, of certain annuities. Clause 12 of the will contained the following proviso: "If for any sufficient reason, whether disendowment may or may not have taken place, the trustees decide that the interests of the Church could be better served by any changes in the method of administering, or even in the object to which the fund is applied under my will, such change or changes may be made with the several consents expressed by a majority of the Diocesan Conferences of Bangor and St. David's":—

Held, that upon the true construction of the whole will the objects to which the trustees were, by clause 12, empowered to change the application of the fund were not other than charitable objects and were religious objects in the interests of the Church as an organization existing for the instruction and edification of the public and that, therefore, the gift in clause 3 of the will was a valid charitable gift.

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The Reverend Robert Camber Williams made his will, dated July 31, 1912, whereby, subject to the exceptions thereinafter stated, he gave all he should die possessed of to be held by the Public Trustee upon trust for investment. The testator then directed that the income, subject to the amounts thereinafter mentioned, should be paid to the following persons, whom he nominated administrative trustees —namely, the Bishops of St. David's and Bangor, the Rector of Llanystymdwy and the Vicars of Lampeter and Dolwyddelan and their successors, together with a layman appointed by the conference of each of the dioceses of Bangor and St. David's. Then by clause 3 of his will the testator (after stating that his wife left her interest in certain property to the testator to be "used as he wished, but for preference for Church purposes") in accordance with her wish devised all he should die possessed of, subject to certain reservations to be stated, as a fund for assisting the education of candidates for Holy Orders in the Church of England to be administered by the above named trustees, the fund to be named "the Catherine and Robert Camber Williams Fund." Clauses 4 and 5 contained directions that the fund should be used only to assist candidates of distinct promise and should be given in Exhibitions either to enable candidates without means

who should already have won Exhibitions or scholarships to enter school or college or to candidates who had not had early educational advantages but who had shown themselves possessed of exceptional abilities. An Exhibitioner who should have done well in his college career and who would in the opinion of the trustees profit by postgraduate study of theology and who had not sufficient means otherwise might have his Exhibition continued. The proportion of school and college Exhibitions, the amount (so long as it was of material help) and the conditions upon which they should be held should be at the discretion of the trustees. A postgraduate Exhibition, if the trustees should deem it advisable, might be increased. Once in every three years one Exhibition should be given to the best candidate from the two parishes of Llanystymdwy and Dolwyddelan provided he should give evidence of distinct ability; failing that, all Exhibitions in those years should be open to Welsh speaking candidates. Then followed gifts of the testator's books, watch and chain, manuscripts and papers and furniture and directions for the payment by the Public Trustee out of income, before the remainder was paid to the administrative trustees, of certain small annuities. By clause 11, so soon as all the above mentioned payments for life should have terminated, the Public Trustee was directed to vest the capital of the fund in the administrative trustees or any Church body capable in law of holding such property as the trustees might direct, the administering of the fund being, as before, in the hands of the trustees. Clause 12 was as follows: "If for any sufficient reason, whether disendowment may or may not have taken place, the trustees decide that the interests of the Church could be better served by any changes in the method of administering, or even in the object to which the fund is applied under my will, such change or changes may be made with the several consents expressed by a majority of the Diocesan Conferences of Bangor and St. David's."

By a codicil to his will, dated June 22, 1917, the testator bequeathed some further annuities and appointed executors of his will and codicil.

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The testator died on March 13, 1924.

The plaintiff, as trustee of the will, took out an originating summons to which the following persons were made defendants —namely, two annuitants under the codicil, the administrative trustees appointed by the will, some of the testator's next of kin and His Majesty's Attorney-General. The summons asked for the determination of (amongst other questions) whether the gift contained in clause 3 of the will of a fund for assisting the education of candidates for Holy Orders in the Church of England was a valid charitable gift or was rendered void by reason of the power conferred upon the trustees under clause 12 of the will.

A. de W. Mulligan for the trustee of the will.

Farwell K.C. and *B. A. Hall* for the administrative trustees. The gift in clause 3 is clearly a good charitable gift. To test whether it is invalidated by the power given by clause 12 to the trustees of the fund to change the objects of the gift is to ask the question whether they could properly apply the fund to any object which was not charitable. The governing intention is to promote the interests of the Church of England, and the power to change the objects is subject to that qualification, that the change must be one which is in the interests of the Church of England. A gift for the advancement of religion is a good charity in the legal sense of the word: see Lord Macnaghten in *Commissioners for Special Purposes of Income Tax* v. *Pemsel.* (1) We do not, however, deny that a religious purpose may not be a charitable purpose. The authorities show, as Lindley L.J. pointed out in *In re White* (2), that a bequest for a religious purpose is prima facie a bequest for a charitable purpose. In *In re Garrard* (3) a bequest to the vicar and churchwardens for the time being of K. was held to be a good charitable legacy for the ecclesiastical purposes of the parish, and the words "to be applied by them in such manner as they shall in their sole discretion think fit" were not inconsistent with the

(1) [1891] A. C. 531, 583. (2) [1893] 2 Ch. 41, 52.
(3) [1907] 1 Ch. 382.

preceding charitable gift and only meant that those persons might direct the particular mode of application within the sphere of those purposes. *In re Davidson* (1) is distinguishable, because there the will itself drew a distinction between charitable, religious or other objects in connection with the Roman Catholic faith in England and included religious societies in the wider sense so as to include such a convent or private religious community as was the subject of discussion in *Cocks* v. *Manners.* (2) *Dunne* v. *Byrne* (3) is distinguishable, because it was within the discretion of the Archbishop to apply the fund to other than charitable objects, to purposes which he might think conducive to religion whether in the legal sense charitable or not. It was well settled that a trust for religious purposes must be treated as a gift for charitable purposes, unless a contrary intention is shown, but only when the trust tends directly or indirectly to benefit the public: *Dunne* v. *Byrne* (3); *In re White* (4); and *Cocks* v. *Manners.* (2) In *MacLaughlin* v. *Campbell* (5) there was a bequest for Roman Catholic purposes which was wide enough to include purposes which were not charitable purposes in the legal sense. There was no gift there for "religious purposes": if there had been and it had been for the public benefit, the gift would, prima facie, have been a good gift for charitable purposes. In *In re Salter* (6) the words "charitable or religious purposes" did not show an intention to enable the fund to be applied for purposes religious but not charitable. In *Arnott* v. *Arnott* (7), following *In re White* (4), religious purposes meant those which were charitable and the gift was not void for uncertainty. In *Moore* v. *The Pope* (8) the gift was not necessarily applicable to charitable purposes, as legally defined, but applicable to purposes which were not only not charitable but possibly illegal.

In the present case the will contained indications that the

(1) [1909] 1 Ch. 567.
(2) (1871) L. R. 12 Eq. 574.
(3) [1912] A. C. 407, 410.
(4) [1893] 2 Ch. 41, 52.
(5) [1906] 1 I. R. 588.
(6) [1911] 1 I. R. 289.
(7) [1906] 1 I. R. 127.
(8) [1919] 1 I. R. 316.

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objects to which the trustees were empowered to apply the fund under the power to change the object given to them by clause 12, were religious objects or purposes; that the interests of the Church which the testator had in mind were the interests of the Church as an organization existing for the instruction and edification of the public. The testator described himself in his will as a Clerk in Holy Orders; the majority of the trustees were holders of public offices in the Church; there was the recital in the will of the expressed wish of the testator's wife, and the devise was expressed to be made in accordance with that wish; the objects which the testator had in mind and to which he empowered the trustees to change the application of the fund were religious objects or purposes in the interests of the Church as such an organization as that already mentioned.

Stamp for some of the next of kin. The gift is not a charitable gift. The fund is liable to be applied under the power contained in clause 12 for a purpose which is not charitable, and must therefore fail for uncertainty. The official character of the donor and the trustees of the fund is irrelevant, as appears from a study of *Hunter* v. *Attorney-General.* (1) We do not dispute that, prima facie, the gift is a charitable one, but the only limit to the extended objects authorized is that they better serve the interests of the Church, which is a limitation on the objects which does not of necessity exclude a non-charitable object. The effect of that is to make the gift void for uncertainty: *Dunne* v. *Byrne.* (2) Objects "serving the interests of the Church" have a wider meaning than objects "of the Church." The former words may include objects not assisting directly or indirectly the operations and duties of the Church, such, for instance, as private ministrations of the Church, to support one side or the other of some controversy or even to promote legislation. There are material interests of the Church as well as spiritual. The purposes of the gift are not identical with the purposes of religion, they have a wider sphere. In

(1) [1899] A. C. 309. (2) [1912] A. C. 407.

Dunne v. *Byrne* (1) Lord Macnaghten said that it could hardly be disputed that a thing might be conducive to religion in a particular diocese without being charitable in the legal sense of the term, and he cited *Cocks* v. *Manners*. (2) If in that case the words had been "as best calculated to serve the interests of religion," the decision, we submit, would not have been different.

Cecil W. Turner for some annuitants.

F. C. Watmough for an executrix and legatee under the will.

Stafford Crossman for the Attorney-General.

CLAUSON J. read the will and proceeded: It is clear that the gift by the testator of his property to the trustee of his will upon trust for investment and to pay the income to the administrative trustees coupled with the gift contained in clause 3 of his will constituted a good charitable gift. But the will does not stop there; and the question remains to be decided whether the effect of the power conferred upon those trustees by clause 12 of the will is to enable the trustees to bring within the scope of the trust objects which are not charitable objects. If that be the true effect of clause 12, then there is no valid charitable gift, and the fund is undisposed of and passes to the testator's statutory next of kin. In *Commissioners for Special Purposes of Income Tax* v. *Pemsel* (3) Lord Macnaghten stated that "charity" in its legal sense comprises, amongst other trusts, trusts for the advancement of religion. But the trusts must be such as tend either directly or indirectly towards benefiting the public. The materiality of that qualification was distinctly brought out by the decision in *Cocks* v. *Manners* (2), where a bequest to a Dominican convent at Carisbrook was held not to be a good charitable bequest on the ground that the services performed by that institution did not tend, either directly or indirectly, towards the instruction or edification of the public. In *Dunne* v. *Byrne* (4) the fund was to be used

(1) [1912] A. C. 407.
(2) L. R. 12 Eq. 574.
(3) [1891] A. C. 531, 583.
(4) [1912] A. C. 407, 410.

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and expended wholly or in part as the Archbishop might judge most conducive to the good of religion in his diocese; and it was decided that there was no valid charitable trust, because there might, in the judgment of the Archbishop, be objects which he considered to be conducive to the good of religion in his diocese which were not necessarily charitable objects in the legal sense of the word "charitable." Lord Macnaghten in that case referred to *Cocks* v. *Manners* (1) as a well known instance of the dedication of a fund to a purpose which a devout Roman Catholic would no doubt consider "conducive to the good of religion" but which was certainly not "charitable"; and Lindley L.J. in *In re White* (2), referring to the same case, said that a society for the promotion of private prayer and devotion by its own members, and which had no wider scope, no public element, no purposes of general utility, would be a religious society, but not a "charitable" one; but he said that a bequest for a religious purpose was, prima facie, a bequest for a "charitable" purpose and that the law applicable to "charitable bequests," as distinguished from the law applicable to ordinary bequests, ought to be applied to a bequest to a religious institution or for a religious purpose.

There are, in my opinion, in the will before me sufficient indications that the only other objects which the testator had in mind to which he empowered the trustees to change the application of the fund, under clause 12, were religious objects or purposes which must serve the interests of the Church as an organization existing for the instruction and edification of the public. It is to be observed that the testator describes himself in his will as a Clerk in Holy Orders; but there are more important indications than that—namely, the recital of his wife's wish that he would use the property she had left to him as he wished, but for preference for Church purposes, and the devise in clause 3, in expressed accordance with that wish. Further, the majority of the trustees appointed to administer the fund are holders of high public offices in the Church with laymen to be appointed by the

(1) L. R. 12 Eq. 574. (2) [1893] 2 Ch. 41, 52.

conferences of each of the dioceses of Bangor and St. David's. In my judgment, for the reasons I have stated, the gift in question is a good charitable gift.

Solicitors: *Philip Rider Christie, for Bone & Payne, Llandudno; Simpson & Co.; Pritchard, Englefield & Co., for Lloyd & Davies, Manchester; Solicitor to the Treasury.*

H. C. H.

In re FORDER.

FORDER *v.* FORDER.

[1926. F. 902.]

Will—Forfeiture Clause—Life Interest—Bankruptcy—Annulment—Test whether before Annulment there is Income payable to or appropriated for Benefit of Bankrupt.

Under the will of a testator, who died in 1910, E. F. became entitled on the death of his mother J. B. to a share in the income of the residuary estate: he was also entitled thereunder in expectancy upon the death of his sister to a further share in such income and, in the event of his becoming the longest liver of his sister and the other beneficiaries, to the entire income and capital thereof. The will provided that, in the event of any beneficiary becoming bankrupt or assigning, charging or incumbering his or her share, such beneficiary should forfeit such share, which should thereupon devolve as thereinbefore provided in case of his or her death. J. B. died on December 14, 1925, leaving her son E. F., who was then an undischarged bankrupt, and her daughter L. M. T. her surviving. The testator's estate comprised a large number of freehold cottages, many of which yielded weekly rents, besides investments in stocks and shares and a sum outstanding on mortgage: and it had been the custom of the trustees to state half-yearly accounts of income on May 2 and November 2 in each year. On April 7, 1926, the bankruptcy of E. F. was annulled. On the hearing of the originating summons before Clauson J. there was evidence before the Court that, after deducting outgoings from the gross amount of income received by the plaintiff during the half-year ending May 2, 1926, there was in his hands a net balance available for distribution; but there was no evidence that at any time between the death of J. B. and the annulment of E. F.'s bankruptcy the plaintiff had in his hands moneys immediately payable.

Upon the question raised by the summons whether the defendant E. F. had forfeited any share or interest to which he was entitled under

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the will by reason of his bankruptcy and whether, if so, the annulment thereof operated to avoid such forfeiture :—

Held, by Clauson J., that, although immediately upon the death of J. B., E. F.'s share in the income vested in him in possession, yet, as the annulment occurred before any rights arising by reason of the bankruptcy were sought to be enforced, and as no income in respect of his share was during the crucial period in fact paid or in the normal course of administration would have been treated as payable to him, the annulment was in time to save the share of income to which he became entitled on the death of J. B. and any other share or interest bequeathed in his favour by the will from forfeiture.

Upon appeal, further evidence was admitted showing that for a number of years it had been the practice of the trustees after discharging current outgoings to prepare a half-yearly account on May 2 and November 2 in each year of the rents and income received by them and then divide and pay the undistributed balance of income amongst the beneficiaries. During the currency of the half-year their practice had been to make monthly payments of 20*l.* to J. B. on account of her ultimate share of the current half-year's income, and one of such payments had been made to her on November 1, 1925, and another on December 1, 1925. In the several months between the date of her death and May 2, 1926, the surviving trustee had at different times paid himself three sums of 50*l.*, one of 80*l.*, and another of 10*l.*, on account of his share of income, indicating thereby that there was income then available for the other beneficiaries.

Held, (1.) that the forfeiture clause was not void for repugnancy, inasmuch as it was limited to cases where bankruptcy had occurred before the beneficiary had become entitled to an absolute interest in the capital.

In re Smith [1916] 1 Ch. 369 distinguished.

(2.) That, upon the further evidence, it was clear that in the interval between J. B.'s death and the annulment of the bankruptcy there was in the hands of the trustee actual income of E. F.'s share, which could be treated as payable to or retained or appropriated for his benefit, and that although the balance payable on May 2, 1926, to the beneficiaries had not then been ascertained, there was money in the hands of the trustee which would have been payable to E. F.'s trustee in bankruptcy unless the forfeiture clause operated, and that consequently the annulment was not in time to save the forfeiture.

Ancona v. *Waddell* (1878) 10 Ch. D. 157 ; *Metcalfe* v. *Metcalfe* [1891] 3 Ch. 1 ; and *In re Laye* [1913] 1 Ch. 298 applied.

(3.) That, upon the true construction of the forfeiture clause, the forfeiture enured to prevent any portion of the share, whether of income or capital, from passing to the beneficiary who had become bankrupt and to deprive him of all interest as a beneficiary under the will.

Decision of Clauson J. reversed upon the further evidence.

ADJOURNED SUMMONS.

William Drake Forder by his will, dated June 12, 1906, gave his residuary estate to his trustees—namely, his son,

William Howard Forder, and Mrs. Jane Bone, upon trusts under which during the life of Jane Bone two-fifth parts of the income were payable to the said William Howard Forder and three-fifths to Jane Bone: and the testator directed that upon the death of Jane Bone leaving her son Ernest Forder and her daughter Lilian Mary Thomson her surviving (an event which in fact occurred) Jane Bone's share should be payable to her son and daughter equally and that upon the decease of either of them the whole of such share should be paid to the survivor and in the case of the decease of the survivor of Jane Bone and her son and daughter during the lifetime of William Howard Forder or of any widow of William Howard Forder the whole was to go to William Howard Forder or his widow, as the case might be, it being the testator's wish and intention that the longest liver of William Howard Forder, any widow of his, Jane Bone, and her children, should take the entire income and also the capital of his estate; and the will contained a forfeiture clause in the following terms: "I declare that if any beneficiary hereunder shall become bankrupt or assign charge encumber or attempt to assign charge or encumber his or her share in the income or capital of my estate or suffer something whereby the same or some part thereof would by operation of law or otherwise if belonging absolutely to him or her become vested in some other person or persons such beneficiary shall forfeit his or her share which shall thereupon devolve as hereinbefore provided in case of his or her death."

The testator died on May 2, 1910, and Jane Bone died on December 14, 1925, leaving her son Ernest Forder and her daughter Lilian Mary Thomson her surviving. A receiving order in bankruptcy had been made against Ernest Forder on March 31, 1914, and he had been adjudicated bankrupt on April 16, 1914: he however procured the annulment of his bankruptcy on April 7, 1926, within four months of the death of his mother Mrs. Jane Bone, the tenant for life.

At the date of Mrs. Bone's death the testator's estate comprised fifty freehold cottages, business premises, stocks

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and shares, and a sum outstanding on mortgage. It had been the custom of the trustees during the past nine years to make up half-yearly accounts of income to May 2 and November 2 of each year. The testator having died on May 2, 1910, the half-yearly accounts from November 2, 1910, up to and including November 2, 1925, were duly submitted to, and approved by, the solicitors for the late Mrs. Bone in her capacity both as beneficiary and as trustee. Between the time of Mrs. Bone's death on December 14, 1925, and April 7, 1926, the trustees appeared to have received a certain amount of gross income in respect of the estate, including a considerable sum of weekly rents from the freehold cottages, the income so received being subject to deductions made in due course for outgoings.

An originating summons was taken out by William Howard Forder raising the question whether the defendant Ernest Forder had forfeited any share or interest he was entitled to under the will by reason of his bankruptcy, and, if so, whether the annulment thereof operated to avoid such forfeiture.

On the hearing of the application before Clauson J. the half-year's account of income up to May 2, 1926, was put in evidence which showed that, after deducting outgoings in respect of repairs, insurance, ground rent, rates and taxes, etc., from the gross amount of income received by the plaintiff during that period, there was in his hands a substantial net balance available for distribution: but there was no evidence then before the Court that at any time between the death of Mrs. Bone and the annulment of Ernest Forder's bankruptcy the plaintiff had in his hands moneys which were immediately payable.

The summons came on for hearing before Clauson J. on November 26, 1926.

Preston K.C. and *W. F. Swords* for the plaintiff. That the bankruptcy of Ernest Forder was sufficient to bring about the forfeiture of his share under the will there can be no question, unless the annulment of his bankruptcy was in time

to get rid of the forfeiture: *In re Loftus-Otway.* (1) In that case the liability of the beneficiary to be deprived of the income had not been got rid of, until a date subsequent to the receipt of income by the trustees which might have been paid to him but for that existing liability. Here the inference from the facts in evidence is almost irresistible that there was at some time before the date of the annulment net income in the hands of the trustees which might have been paid to Ernest Forder but for his bankruptcy. The reason given for the actual decision in *White* v. *Chitty* (2) shows that in the present case there is a forfeiture. In that case the tenant for life of freeholds whose interest was liable to forfeiture on bankruptcy, was himself in possession, and it was held there was no forfeiture; because, before any demand made or possession taken by the official assignee, the bankrupt by his diligence had obtained annulment. The principle of *White* v. *Chitty* (2) was admitted by Jessel M.R. in *Samuel* v. *Samuel* (3) to be sound—namely, that the Court considers the intention of the settlor who makes the disposition coupled with a clause of forfeiture on bankruptcy or alienation to be that the disposition should enure for the personal enjoyment and benefit of the beneficiary and will therefore construe that clause, if ambiguous, in such a way as to give effect to that intention. The only difference between Jessel M.R. and Wood V.-C. was as to the exact time at which the operation of the doctrine was to be applied: *Samuel* v. *Samuel.* (3) There Jessel M.R. expressed an opinion that, if there is a bequest to A. for life, with remainder to B. absolutely followed by a clause of forfeiture in the event of B.'s bankruptcy or alienation, and B. charges his interest in the lifetime of the tenant for life, in order to save a forfeiture, the charge must have been vacated before the period of distribution, namely, the death of A., and not merely before the time of B.'s first receipt of money under the bequest. In the case of *In re Laye* (4) during the time that the receiving order was in force moneys came to the hands of the trustees

(1) [1895] 2 Ch. 235.
(2) (1866) L. R. 1 Eq. 372.
(3) (1879) 12 Ch. D. 152.
(4) [1913] 1 Ch. 298.

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which, but for the order, would have been payable to the debtor, and a forfeiture was held to have taken place. We rely on that case.

Bennett K.C. and *P. M. Walters* for Ada Elizabeth Forder, the wife of the plaintiff, and *Wilfrid Hunt* and *Mulligan* for Mrs. Thomson, supported the last argument in favour of a forfeiture.

G. B. Hurst K.C. and *W. F. Waite* for Ernest Forder. The annulment was in time to save a forfeiture. The trustee owed no duty to any beneficiary to pay any income until the half-yearly account had been stated on May 2, 1926, according to arrangement made between them; nor had any demand in the meantime been made for earlier payment. The annulment of the adjudication, having occurred before the time when any obligation to pay arose, was in time to prevent the forfeiture. The principle applies, that if nothing is done to intercept the income pending annulment, there is no forfeiture: *White* v. *Chitty* (1); *Lloyd* v. *Lloyd* (2); *In re Parnham's Trusts* (3); *Ancona* v. *Waddell.* (4) The preference given by Stirling J. in *In re Loftus-Otway* (5) to Lord Hatherley's view over that of Jessel M.R. in the cases before cited, is to be followed. In *In re Loftus-Otway* (5) the trustees had moneys in hand available for distribution before annulment. Unless the trustees have been asked to pay over moneys in their hands available for distribution or it is their duty to pay, annulment has the effect of wiping out the forfeiture: Halsbury's Laws of England, vol. ii., p. 92, para. 148. There is a crucial distinction, as is pointed out by Pearson J. in *Robertson* v. *Richardson* (6), between cases where during the pendency of the bankruptcy the estate was in process of being administered and cases where regularly accruing income, as in the present case, is payable. At most, the forfeiture clause can only affect the bankrupt's share of income to which he became entitled in possession on the death of the tenant for life: the forfeiture clause,

(1) L. R. 1 Eq. 372.
(2) (1866) L. R. 2 Eq. 722.
(3) (1876) 46 L. J. (Ch.) 80.
(4) 10 Ch. D. 157.
(5) [1895] 2 Ch. 235.
(6) (1885) 30 Ch. D. 623, 628.

notwithstanding the word "share" in that clause, is a comprehensive term and includes a reversionary share in both income and capital, is severable and will not operate to forfeit his interests in reversion. The object of a forfeiture clause is to insure the legatee's personal enjoyment of the income; and, therefore, his interests in reversion are not affected: *Metcalfe* v. *Metcalfe*. (1) In any event the forfeiture clause has no effect on any share or interest whatever of the bankrupt under the will. As the clause purports to forfeit his absolute interest in capital when it comes into possession, it is therefore void altogether on the ground of repugnancy and the clause cannot be split up and be held to be valid as to the reversionary interests and void as to absolute interests: *In re Smith*. (2)

Bennett K.C. in reply. The forfeiture clause is not intended to operate in respect of his interest in capital after that interest has fallen into possession. It only applies to capital during the period while the interest in capital is in reversion and can devolve under the limitations in the will. There can be here no question of repugnancy, as in *In re Smith*. (2) The "share" which is subject to the forfeiture clause is a comprehensive term and includes a reversionary interest in both income and capital.

1926. Dec. 20. CLAUSON J. read the following judgment: This is an originating summons for the determination of the question whether, having regard to the fact that the defendant Ernest Forder was adjudicated bankrupt on April 16, 1914, his share or interest in the property bequeathed to him by the will of William Drake Forder was forfeited and, if it was forfeited, whether the annulment of such bankruptcy on April 7, 1926, restored him to his original rights under the will or operated in any way to avoid such forfeiture. [His Lordship then stated the will and the subsequent facts above set out and continued:] Before the decision of the Court of Exchequer in *Smallcombe* v. *Olivier* (3) there was the high

(1) (1889) 43 Ch. D. 633. (2) [1916] 1 Ch. 369.
(3) (1844) 13 M. & W. 77.

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authority of Eldon L.C. for the view that annulment of a bankruptcy (or the equivalent under preceding legislation of that which is, under modern Acts, annulment of the bankruptcy) resulted in putting all parties back for all purposes into precisely the same position as if the bankruptcy had never taken place at all: see *Ex parte Jackson.* (1) If that were still a true view of the law, I could take a short cut and decide this case in favour of the defendant Ernest Forder and against forfeiture on the ground that the bankruptcy and the consequent forfeiture must be treated as wiped out by the annulment. That short cut is not, however, now open to a judge of first instance. *Smallcombe* v. *Olivier* (2), in effect, decides that, prima facie, the bankruptcy operates fully up to the date of annulment, and that acts done up to that date remain unaffected by the annulment. The authorities, however, show that this prima facie rule must not be treated as universally true. In considering the question how far a forfeiture occasioned by bankruptcy will be wiped out by an annulment of the bankruptcy, the Court has regard to the true intention of the settlor, which is to prevent the property intended for the object of his bounty passing over to a stranger; for example, to an assignee in bankruptcy: *White* v. *Chitty.* (3) Thus, if the words of the document which contains the forfeiture clause refer to a bankruptcy in language sounding in the future, the Court will, nevertheless, have regard to a past but un-annulled bankruptcy in order to effectuate the intent; and the Court will treat the forfeiture as not having arisen at all if the bankruptcy, though it in fact occurred, is annulled "in time," before any part of the property has been acquired under the forfeiture clause: see *White* v. *Chitty.* (3) There is a long line of authority as to what will be "in time" for this purpose.

There is no doubt that annulment will be in time, if it occurs before any interest of the claimant (as I will call the person whose interest is subject to the forfeiture clause) is vested in possession: *In re Parnham's Trusts* (4) and

(1) (1803) 8 Ves. 533.
(2) 13 M. & W. 77.
(3) L. R. 1 Eq. 372.
(4) 46 L. J. (Ch.) 80.

Samuel v. *Samuel*. (1) So far all the authorities agree. Sir George Jessel M.R. would, apparently, have held that an annulment would not be in time if it occurred after the moment at which the interest vested in possession: *Samuel* v. *Samuel*. (1) But he never actually so decided. If he had so decided it might have been open to me, as a judge of first instance, to take a short cut in the opposite direction, and to decide, in the circumstances of the present case, that there was a forfeiture at the moment at which Mrs. Bone, the tenant for life, died. The authorities, however, indicate that the annulment will be in time if it occurs before the earliest date at which rights arising under the forfeiture clause from the existence of the bankruptcy are enforced. I have had great difficulty in satisfying myself as to the exact ratio decidendi in the case of each of the relevant authorities and I do not propose to state the several authorities at length. But on the best consideration I can give to them, they appear to me to establish that the following circumstances are equivalent to an enforcement for this purpose of the rights arising under the forfeiture clause: (1.) recovery in an ejectment action by the person in whose favour the forfeiture operates: *White* v. *Chitty* (2), and, possibly, the issue of a writ in an ejectment action: see *Smith* v. *Gronow* (3); (2.) the actual payment of income to the person in whose favour the forfeiture operates: *Lloyd* v. *Lloyd* (4); (3.) retention (by the trustees of the fund) of income which, but for the event occasioning forfeiture, they would have paid in the ordinary course to the claimant: *In re Parnham's Trusts* (5); *In re Loftus-Otway* (6); (4.) tacit recognition by the trustee in bankruptcy that the forfeiture clause has operated coupled with the fact that payments have been made by the trustees of the fund on the footing that the forfeiture clause has or may have operated: *Robertson* v. *Richardson*. (7) If any such occurrences as these take place before the annulment they will have the result of preventing the annulment operating to wipe out

(1) 12 Ch. D. 152.
(2) L. R. 1 Eq. 372.
(3) [1891] 2 Q. B. 394.
(4) L. R. 2 Eq. 722.
(5) (1872) L. R. 13 Eq. 413.
(6) [1895] 2 Ch. 235.
(7) 30 Ch. D. 623.

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the bankruptcy and, accordingly, the forfeiture clause will operate notwithstanding annulment.

On the other hand if the claimant's interest, though technically vested in possession, is of such a character (for example, a claim as residuary legatee against the estate of a testator who has not been dead for twelve months) as not to become, before the annulment, enforceable, so as to lead to immediate payment, and in fact no payment is made before annulment (*Ancona* v. *Waddell* (1); *Lloyd* v. *Lloyd* (2)), annulment will be in time and the forfeiture will not operate.

From the above summary of the authorities I have omitted *In re Laye.* (3) It was pressed upon me that I must treat that case as an authority for the view that if any income arising from the claimant's interest reaches the trustees of the settlement before annulment of the bankruptcy, the annulment will not wipe out the forfeiture effected by the bankruptcy. In my opinion the case does not go that length. At most, it is an example of the class of cases which I have grouped under the third head above. The income to which Eve J. referred in that case was income which was assumed to have come to the hands of the trustees in such circumstances as to be immediately payable to the claimant: see the note at the conclusion of the judgment on p. 303. The case does not appear to me to cover the present case where, as I understand the facts, all that the trustees received during the critical period was gross income which would be subject in ordinary course to deductions for outgoings, and would not, in the normal course of administration, be treated as available for immediate distribution.

Having regard to the authorities which I have summarized above, I must, in my judgment, hold that in the present case the annulment came in time; for, although no doubt an interest of the defendant Ernest Forder vested in possession on the death of Mrs. Bone prior to the annulment of the bankruptcy, the bankruptcy was in fact annulled before any rights arising from the existence of the bankruptcy were

(1) 10 Ch. D. 157. (2) L. R. 2 Eq. 722.
(3) [1913] 1 Ch. 298.

enforced against the property in question. No payment of income in respect of the defendant Ernest Forder's interest was in fact made between the date when the tenant for life died and the date of the annulment; and, according to the normal course of administration, no such payment of income would have been made during that period.

I shall accordingly declare that the share or interest in the property bequeathed to the defendant Ernest Forder by the testator's will is not to be treated as having been forfeited by reason of his bankruptcy, such bankruptcy having been annulled on April 7, 1926.

H. C. H.

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Mrs. Thomson appealed. The appeal was heard on April 26, 27 and 28, 1927.

Upon the hearing of the appeal further evidence was admitted the purport of which is fully set out in the following judgment of Lord Hanworth M.R. The short effect of it was that for a number of years it had been the practice of the trustees of the will, after discharging the current outgoings, to prepare a half-yearly statement of account, on May 2 and November 2 in each year, of the rents, profits, dividends and interest received by them and then to divide and pay the undistributed balance of the income amongst the beneficiaries. During the currency of the half-year, however, their practice had been to make monthly payments of 20*l.* to Mrs. Bone on account of her ultimate share of the current half-year's income, and one of such payments had been made to her on November 1, 1925, and another on December 1, 1925, a fortnight before her death. In the several months between the date of her death and May 2, 1926, the plaintiff, the surviving trustee, had himself drawn out at different times three sums of 50*l.*, one of 80*l.*, and another of 10*l.* on account of his share of income, indicating thereby that there was income then available for the other beneficiaries.

Manning K.C. and *Wilfrid Hunt* for the appellant. The question is whether the annulment of Ernest Forder's

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bankruptcy was in time to save the operation of the forfeiture clause in the will. Upon the authorities the test in ascertaining whether the annulment comes in time is to ascertain whether it took place before the first payment to the bankrupt became due which but for the forfeiture clause would have been payable to his trustee in bankruptcy. If no payment has become due between the date of the accruer of the title of the trustee in bankruptcy and the annulment, then the forfeiture does not take effect: *Robertson* v. *Richardson* (1); *Metcalfe* v. *Metcalfe* (2); and *In re Laye.* (3)

The further evidence shows that by May 2 there was an actual balance of income available for division.

[LAWRENCE L.J. But in the interval between the death and May 2 the trustee himself had retained sums of 50*l.* on account of his share, and therefore, unless he was committing a breach of trust in so doing, there should have been 75*l.* each time payable or appropriated in respect of the other shares.]

The fair inference is that during the six months' interval there would be a gradually increasing excess of income over expenditure, and the question is whether there was any income payable. We submit that there was, and that the case is covered by the authorities: *Metcalfe* v. *Metcalfe* (2); *Robertson* v. *Richardson* (1); *In re Loftus-Otway* (4); and *In re Laye* (3); and that there was a forfeiture by Ernest Forder of all his share and interest under the will. Upon the true construction of the forfeiture clause, it extends to the whole share or interest of Ernest Forder, whether in income or capital.

P. M. Walters, for the wife of the plaintiff, supported the appeal.

G. B. Hurst K.C. and *W. F. Waite* for the respondent Ernest Forder. Before any question of forfeiture by reason of the bankruptcy arises, the validity of the forfeiture clause has to be considered, and we submit that it is bad, because it refers not only to contingent reversionary, but also to

(1) 30 Ch. D. 623.
(2) [1891] 3 Ch. 1.
(3) [1913] 1 Ch. 298.
(4) [1895] 2 Ch. 235.

absolute, interests. A forfeiture clause of this kind attached to an absolute interest is repugnant and void : *In re Smith.* (1) The word " share " in the forfeiture clause is intended to cover both income and capital, and the taking of the capital absolutely by the survivor, and that is clearly repugnant.

Assuming that the forfeiture clause is good ; then the annulment of the bankruptcy was within four months of Jane Bone's death, and not until July, 1926, were the accounts approved under which the rents down to May 2 previous would have been paid. On the authorities, forfeiture has never been insisted upon where the annulment has taken place (*a*) before any payments of income of the share were made to the person who had been bankrupt ; (*b*) before any claim has been made by the trustee in bankruptcy or by some person under the gift over; and (*c*) before the trustees were under a positive or immediate duty to distribute the income. The mere fact that income might have been distributed is not enough. There must be an obligation upon the trustees to distribute it, and until there is, the annulment comes in time.

In *White* v. *Chitty* (2) the bankrupt obtained the annulment of his bankruptcy within four months of the testator's death and before any claim was made or property handed or paid over, and it was held that there was no forfeiture. That decision applies here. Again in *Lloyd* v. *Lloyd* (3) the bankruptcy was annulled before any interception of the property had taken, and there was no forfeiture. In this case it cannot be said " that there was any actual income of the share which could be treated as payable to, or retained for or appropriated for the benefit of this residuary legatee " within the observations of Hall V.-C. in *Ancona* v. *Waddell* (4), and the practice of the trustees in making half-yearly accounts and payments must receive due recognition. If that is done, then the decision in *In re Loftus-Otway* (5) will not affect this case.

(1) [1916] 1 Ch. 369.
(2) L. R. 1 Eq. 372.
(3) L. R. 2 Eq. 722.
(4) 10 Ch. D. 157, 162.
(5) [1895] 2 Ch. 235.

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If, however, it is held that the annulment was not in time to avert the forfeiture of the interest which fell into possession on the death of Mrs. Bone, then on the true construction of the will we submit that the forfeiture must be confined to that particular interest in that income, and does not apply to the share of capital to which he will be entitled if he is the longest liver of the named beneficiaries. His personal enjoyment of that will not be interfered with by reason of the bankruptcy, which will not operate to forfeit that : *Metcalfe* v. *Metcalfe* (1) ; *In re Parnham's Trusts.* (2) There was no appeal from the decision of Kekewich J. on that point in the former case ; the only question raised on the appeal (3) related to the forfeiture of the life interest. The forfeiture here cannot extend to further income to which Ernest Forder may become entitled, or to his interest in capital at all. The will talks about share of income and share of capital, which are split up into various shares in possession and in reversion, and we submit that the forfeiture clause does not apply to more than the particular share for the time being.

W. F. Swords for the respondent trustee of the will, W. H. Forder.

Manning K.C. in reply. The bankrupt forfeits his share as if he were then dead ; and that extends to and affects his whole interest whether in possession or reversion.

LORD HANWORTH M.R. This is an appeal from a decision of Clauson J., who had to decide what was the true effect of the forfeiture clause which appears in the will of the testator. [His Lordship stated the provisions of the will and continued :] Mrs. Bone, to whom three-fifths of the income were payable during her life, died on December 14, 1925, and thereupon Ernest Forder became entitled, with his sister, to the enjoyment in moieties of the estate which had previously belonged to Mrs. Bone. Unfortunately, on April 16, 1914, Ernest Forder had become bankrupt, and we have to determine whether or not the forfeiture clause operated

(1) 43 Ch. D. 633. (2) 46 L. J. (Ch.) 80.
(3) [1891] 3 Ch. 1.

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to deprive Ernest Forder of his interest. It is said that it did not, because on April 7, 1926, that is four months or five months after the death of Mrs. Bone, that bankruptcy was annulled, and that inasmuch as the bankruptcy was annulled, the bankruptcy is to be treated as non-existent and the forfeiture clause does not operate.

The principle has been stated many times, but perhaps is as clearly stated as it can be in the judgment of Lindley L.J. in *Metcalfe* v. *Metcalfe* (1), in this way, that if there was nothing on which the forfeiture clause could operate before the bankruptcy was annulled, then the forfeiture clause must be treated as ineffective.

The case has been argued before us in an interesting and helpful manner on both sides. As a matter of fact, we have to deal with the case upon further evidence beyond that which was before Clauson J. and therefore, in differing from his judgment, it must be stated quite plainly that this Court is dealing with material which was not before him and which, if it had been before him, would probably have led him to take the same view that this Court is bound to take.

First of all, I ought to deal with one argument presented to us by Mr. Hurst, that the forfeiture clause is ineffective and void for repugnancy in accordance with the decision of Sargant L.J., when a judge of first instance, in *In re Smith* (2); but it appears to us, for the reasons which were given in the course of the argument, that the principle of that case does not apply, and that it is not possible to overlook the effect of the forfeiture clause on the ground of repugnancy.

The facts of this case as now presented to us are these. It appears that over a considerable period of years (I am content to take the number from the later affidavit of Mr. Andrews, namely nine years) that the method which was adopted in appropriating this income was as follows: half-yearly statements were made on May 2 and on November 2

(1) [1891] 3 Ch. 1. (2) [1916] 1 Ch. 369.

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in each year; the income was derived from property, small freehold cottages, from which a large sum in weekly rents was obtained, appearing from the accounts before me to amount to 687*l.* 14*s.* 6*d.* There were also quarterly rents which amounted to 816*l.* 15*s.* No doubt there were important deductions to be made from that gross income; taking the same statement, they amounted in the half-year in question to 162*l.* 10*s.* for repairs; the rates and taxes were 375*l.* 13*s.*; and in all, in that particular half-year the outgoings were 676*l.* 4*s.* 4*d.*, which have to be set against the weekly rents and the quarterly rents added together. There were also sums received on account of dividends and interest to an amount over 200*l.*, which is not negligible. The system which was adopted was this, that a payment of 20*l.* a month was made to Mrs. Bone in respect of her three-fifths share, and then at the end of the half-year the sum shown at that time to be due was paid over to her.

She died on December 14, 1925, and the account for the latter period shows that she had, in accordance with the system then in practice, received two monthly sums, a sum of 20*l.* paid apparently in advance on November 1 outside the previous account for the half-year, and a sum of 20*l.* on December 1; and from and after December 14 her interest would pass to her son and daughter, who were to share in moieties. The affidavit now before us shows that that system, that is to say of making intermediate payments, was continued, because Mr. William Howard Forder, the trustee, who is also a beneficiary, was able in the half-year which ran from November 2, 1925, down to May 1, 1926, to make payments to himself, and it appears that he received during that time three sums of 50*l.*, one sum of 80*l.*, and another of 10*l.*, in the several months which followed from November 2 of 1925. What is the effect of that evidence? It is said that we ought to consider the money which is due in respect of this interest as due only at the end of each half-year, November 2 and May 2. But do the facts accord with that view? If the system which I have

stated and which had been in vogue for the period of nine years was continued, it would appear that if Mrs. Bone had lived she would have continued to receive her 20*l.* a month. Is there any reason to suppose that if no difficulty had occurred, the new beneficiaries, Mr. Ernest Forder and Mrs. Thomson, would not have received a payment month by month in respect of their share? This view is reinforced by what in fact happened in the case of the two-fifth shares payable to the plaintiff Mr. William Howard Forder, and it is plain from the fact that he received these sums to which I have referred, that the estate was treated as yielding net sums payable to the beneficiaries, quite apart from the ultimate balance which they would receive as their share at the end of each half-year. To be quite precise, it would appear that when Mr. William Howard Forder found himself able to pay to himself these sums of 50*l.* and other sums, he was confirming the view that there were net sums in the hands of the trustees available for immediate payment. If one analyses the payments to himself they mean this, that if he was able to pay to himself a sum of 50*l.* in respect of his two-fifths share, there must also have been available for payment to the two beneficiaries who succeed to Mrs. Bone's life interest, a sum of 75*l.*, or, if one treats the figure received by the plaintiff as 50*l.* only and placed in his hands as the ripe fruit received into his hands from the estate, then he would be entitled himself to hold but 20*l.* of that figure, and he would have to hand over 30*l.* to the two other beneficiaries, Mr. Ernest Forder and Mrs. Thomson. In other words, for every 2*l.* that would be received by the plaintiff himself, he would out of the sum in his hands have had to pay 30*s.* to Mr. Ernest Forder and 30*s.* to Mrs. Thomson. Examining, therefore, the facts which are now before us, it appears impossible to treat them otherwise than as establishing that there was ripe fruit of this estate ready to be paid and payable to the beneficiaries, Mr. Ernest Forder and Mrs. Thomson, during the time which elapsed after the death of Mrs. Bone on December 14 and the making up of the next half-yearly account on May 2, 1926.

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I have dealt with those facts at some length, because it appears important to deal with the argument reasonably presented to us, that the point of time at which we have to look for the possible receipt of money is May 2 and not earlier; but for the reasons which I have given, upon the facts as they now appear to us, it is necessary to reject that argument and to treat this estate as producing net proceeds payable both to Mr. Ernest Forder and to Mrs. Thomson during the period which immediately followed upon the death of their mother, Mrs. Bone.

In *Metcalfe* v. *Metcalfe* (1) Lindley L.J. examined the cases and referred to what was said by Wood V.-C. in *White* v. *Chitty* (2): "I am bound to hold that the act of forfeiture in this instance never occurred, because this gentleman has always been in possession and receipt of these rents, nobody else having been in a position to receive them," and then Lindley L.J. contrasted that with what was said in *Robertson* v. *Richardson* (3), where it was laid down that if any income became due under the testator's will which the trustee in bankruptcy of the legatee might, but for the forfeiture clause, have received, the forfeiture took effect. I think that that principle is the correct summary of the cases, and, if that be so, it would appear that from and after December 14 there were sums which the trustee of the will could have been asked to hand over to the trustee in bankruptcy of Mr. Ernest Forder, then properly constituted, before the annulment of the bankruptcy on April 7, 1926, and if that be so, there was something upon which the forfeiture clause could and would have operated—sums which the forfeiture clause alone prevented the trustee in bankruptcy from receiving.

The best test whether the clause operates appears to be stated in *Ancona* v. *Waddell* (4), before Hall V.-C., where he says that one has not to see whether in fact the money had been paid over or how the money actually stood, but

(1) [1891] 3 Ch. 1, 5.
(2) L. R. 1 Eq. 372.
(3) 30 Ch. D. 623.
(4) 10 Ch. D. 157, 162.

the test is whether "it could be said that there was any actual income of the share which could be treated as payable to, or retained for or appropriated for the benefit of this residuary legatee." That test appears to me to accord with the decision reached in *Metcalfe* v. *Metcalfe* (1), to be consonant with the decision in *White* v. *Chitty* (2), and also to agree with the decision of Stirling J. in *In re Loftus-Otway*. (3) In a careful examination of the authorities Stirling J. points out that it was said in one of the cases to which he refers that the question of the actual receipt of the income ought not to make any difference, but he regards the test put by Hall V.-C. as the true governing principle. In the same way that principle was adopted by Eve J. in *In re Laye*. (4) In that case the trustees alleged that at the date of the receiving order they had overpaid the tenant for life, but by January 3, 1911, the crucial date, they had money in hand ready for payment, and it was because of the money that came into their hands ready for payment and, but for the forfeiture clause, would have been paid over, that Eve J. held that the forfeiture clause operated; and the declaration in that case was made on the assumption that there was at some time between the date of the bankruptcy and the annulment, some income in the hands of the trustees payable to the tenant for life.

It appears to me, therefore, after an exhaustive examination of the authorities, that the true test to apply is the test which was laid down by Hall V.-C. and to ask oneself, was there actual income of the share which could be treated as payable to, or retained for or appropriated for the benefit of this residuary legatee, Ernest Forder? Upon the facts as I have examined them, the answer to that question must be "Yes"; and if an application had been made by the trustee in bankruptcy, that of the sums, a share of which had been either paid over to or rightly taken by the plaintiff for his own purposes, a corresponding

(1) [1891] 3 Ch. 1.
(2) L. R. 1 Eq. 372.
(3) [1895] 2 Ch. 235.
(4) [1913] 1 Ch. 298.

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proportionate share should be handed over to him as representing the estate of Ernest Forder, there would have been no answer to such an application. If that is the true position, then it appears that in this period of a half-year, although the total balance payable to the estate had not been then ascertained, there clearly was money in the hands of the trustee which would have been payable to the trustee in bankruptcy but for the operation of the forfeiture clause.

Once it did operate, then what is the effect? It is impossible to accept the second argument presented by Mr. Hurst that it could operate only upon income and not upon the capital. A close examination of the clause appears to me to show that the intention of the testator was to deal with the share, whether of capital or income, that should belong to the beneficiary who should either become bankrupt or should suffer something whereby some part of it would by operation of law or otherwise, pass to others; and if that event happened, thereupon, that is, upon the bankruptcy or upon the assignment or charge, then and at once the share of the beneficiary who had become bankrupt, or had otherwise assigned, immediately devolved "as hereinbefore provided"; that is the punctum temporis to which one has to look, and the forfeiture enured to prevent any portion of the share, including both income and capital, from passing to the beneficiary who had become bankrupt, and made it devolve as provided in case of his or her death.

It appears to me that for these reasons the forfeiture clause did operate and was effective; and, therefore, upon the facts now before us, we are compelled to differ from the judgment given by Clauson J. and to hold that the forfeiture clause deprived Ernest Forder of his interest as a beneficiary under the will.

The appeal must be allowed with costs.

SARGANT L.J. I am of the same opinion. I will deal first with the argument put forward by Mr. Hurst, which

comes logically first—namely, whether the forfeiture clause itself was repugnant and void. For that purpose Mr. Hurst invited us to consider the clause as being one which applied to every interest of the beneficiaries, whether in possession or in reversion, and if that was so, of course the effect of the clause would be to take away by condition subsequent property which was already vested in possession in the legatee if the legatee attempted to assign or dispose of it, or if he went bankrupt. Well, of course that would be a condition entirely inconsistent with ownership; it is impossible to give the ownership of property to a person in possession, and at the same time to direct that he shall not have the ordinary rights and incidents of ownership, that he shall not be able to dispose of it, and that it shall not vest in his trustee in bankruptcy. Therefore, if that construction of the clause were right, Mr. Hurst would be fully entitled to the result he contended for—namely, that the whole clause would be repugnant and void. In support of the result of the clause on such a construction he cited a decision of my own in *In re Smith* (1), but on looking at the clause itself, it seems to me quite clear that the clause does not extend to any interest that is in possession, that it only extends to interests in reversion, and so far from taking away those interests in reversion, it merely has this effect, that it prevents, in a certain event before those interests fall into possession, those interests coming into the ownership of the person in question, the beneficiary, and gives the property in those interests over to other persons. It seems to me quite clear that the clause is dealing with interests which would thereupon "devolve as hereinbefore provided in case of his or her death," and is therefore dealing with the interests which under the prior clauses were directed to go to other persons at a time when the interests were still interests in reversion. I will not deal with the clause in greater detail, but to my mind it is sufficiently clear on the language of the clause that it was not intended to displace existing ownership in possession by virtue of some act or consequence involved in the notion of ownership, but that

(1) [1916] 1 Ch. 369.

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it was intended to prevent ownership attaching in case something should have happened before the property vested in possession; and therefore the decision in *In re Smith* (1) really has no relevance to the present case, having regard to the terms of the clause here.

That being so, I come to the main question, which was fully and ably argued on both sides, the question as to the date at which an annulment of bankruptcy has to take place in order that the bankrupt may be saved from the usual consequences of bankruptcy. Here, as the Master of the Rolls has pointed out, we are in possession of much fuller materials than those which were in the possession of Clauson J. and therefore we are differing from him on a clearer and fuller statement of the facts. I will not repeat or enlarge on what was said by the Master of the Rolls with reference to those facts, but will only say that it seems to me clear, whether because of the retention by the trustee of sums on his own account, or by an examination of the accounts as shown by the further documents, that between December 14, when the tenant for life died, and April 7, 1926, when the bankruptcy was annulled, there must have been in the hands of the trustees moneys available to be paid to the beneficiaries in question. I think there can be no reasonable doubt at all of that fact, and that being so, the question is, what is the last date on which the annulment of bankruptcy would be good for the purpose of saving the interest of the bankrupt? Is that last date the date when there was money available and ready to be paid to him? or may the last date be postponed to a later time—namely, the time when an actual payment is made of the money, or when some actual step has been taken to enforce the right? Clauson J., after an examination of the authorities, has come to the conclusion that the latter date will be in time. In my judgment, the authorities, when they are carefully examined and looked at, are not consistent with that view, and show that the latest time for the annulment of the bankruptcy is a time before there were in the hands of the trustees moneys

(1) [1916] 1 Ch. 369.

available for payment, or to payment of which the beneficiary had a right.

The authorities have now to be considered. *White* v. *Chitty* (1) is a very peculiar case indeed, where there was a gift over of rents received by some other person, and the tenant for life was a person in occupation of the house himself, and no occupation rent had been fixed. That is dealt with quite sufficiently by Pearson J. in his precise and, I think, admirable judgment in *Robertson* v. *Richardson* (2); he said: "In *White* v. *Chitty* (1) the bankrupt himself had been in occupation of the house which had been devised to him for his life, and no rent could have been demanded from him until he had been charged with an occupation rent." That case was a very peculiar one and I do not think is any authority in this case. Then came the two cases of *Lloyd* v. *Lloyd* (3) and *Ancona* v. *Waddell.* (4) In each of those there was this peculiarity, that the person in question, the tenant for life, was a tenant for life of a trust fund to be constituted out of residue, and the residue had not been ascertained so as to make a definite trust fund, to the income of which the beneficiary was entitled. It was on that ground, as is quite clearly stated in the cases, that it was held there was no sum payable to the tenant for life until the time of the annulment of the bankruptcy had passed; and it is observable that in *Ancona* v. *Waddell* (4) Hall V.-C., whose opinion on matters of this kind is of very great importance, says, as the Master of the Rolls has mentioned, that the time was the time at which it could be said that there was any actual income of the share which could be treated as payable to, or retained for or appropriated for the benefit of this residuary legatee. He did not think that the time could be extended until the time at which some actual payment had been made, or some step had been taken to enforce payment.

Then came the case of *Robertson* v. *Richardson* (2), where Pearson J. examined the earlier authorities, and at the

(1) L. R. 1 Eq. 372.
(2) 30 Ch. D. 623, 627, 628.
(3) L. R. 2 Eq. 722.
(4) 10 Ch. D. 157.

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conclusion of his judgment he says: "The circumstance which was relied on in all the three cases to which I have referred"—those are the three I have mentioned: *White* v. *Chitty* (1); *Lloyd* v. *Lloyd* (2); and *Ancona* v. *Waddell* (3)—"in order to escape from the clause of forfeiture, viz., that no right to receive the income in question had accrued to the assignee in bankruptcy, is wanting in the present case." So that his test is, was there a right to receive present income on the part of the beneficiary, not the test whether income had been paid, or whether steps had been taken to recover the income.

Then came the extremely important and leading case of *Metcalfe* v. *Metcalfe* (4), and there I find that that time was taken as decisive in the judgment of all the Lords Justices. Lindley L.J. says: "Was there ever a time after the death of the testator at which the other legatees were entitled to demand from the trustees of the will payment of the bankrupt's share?" and later on he says, again referring to *Robertson* v. *Richardson* (5), and obviously approving of it, that "in *Robertson* v. *Richardson* (5), it was laid down that if any income became due under the testator's will which the trustee in bankruptcy of the legatee might, but for the forfeiture clause, have received, the forfeiture took effect." Bowen L.J. says that this doctrine has "never been carried further than the case in which no right to have anything paid over has accrued to the trustee in bankruptcy. It has been pointed out in *Robertson* v. *Richardson* (5) that in determining whether a forfeiture clause takes effect, the crucial time in the case of a gift of income is the time when the right to have the first payment of income accrues," and the same view is enunciated by Fry L.J., who says: "The time, therefore, at which we must regard the rights of the parties is the time at which it first becomes the duty of the trustees of the will to make a payment."

(1) L. R. 1 Eq. 372.
(2) L. R. 2 Eq. 722.
(3) 10 Ch. D. 157.
(4) [1891] 3 Ch. 1, 5, 6, 7.
(5) 30 Ch. D. 623

It is quite true that in *Metcalfe* v. *Metcalfe* (1) there had been actual payments made in accordance with the view of the trustees that the forfeiture had taken place, but that is immaterial. That only showed that there had been payments due or receivable. The Lords Justices disregarded the fact that there were actual payments with regard to which there was a right to receive ; what they relied upon in their judgment was merely that there was a right to receive the income. They laid no stress whatever on the circumstance that the trustees had made payments in fact in accordance with their views that the forfeiture had taken place, and indeed it would be quite contrary to principle to hold that the rights of the beneficiaries should be determined by the circumstance whether the trustees had or had not acted on a particular view. The determining circumstance was what was the right of the parties at the crucial date.

In my judgment the case of *Metcalfe* v. *Metcalfe* (1) renders the matter reasonably clear, and shows that the latest date for the annulment of the bankruptcy to be effective, would be a date just prior to the time when there was some payment of income that could be rightly made and rightly received, and the same view clearly was taken by Eve J. in the case of *In re Laye* (2), because the inquiry that he directed was an inquiry based upon that view. In my judgment therefore the test adopted by Clauson J. for determining the latest time puts the latest time too late, and the annulment of the bankruptcy would not be effective if made after the time when there was a payment properly payable, or properly receivable, though before the time when a payment was actually made, or when some step was taken to enforce payment.

That being so, on the main question I am of opinion that the appeal ought to be allowed, and I will deal only with one subsidiary question which was suggested by Mr. Hurst—namely, what was the effect of the forfeiture clause, did it operate to forfeit the whole share of the bankrupt, Mr. Ernest Forder, both in income and in capital, or had it an effect

(1) [1891] 3 Ch. 1. (2) [1913] 1 Ch. 298.

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only upon his interest in the income? Here it is observable that the testator deals with the share of the beneficiary as one complete compendious interest; his interest was this, that he was to receive on his mother's death a certain proportion of the income, and that proportion would gradually increase if he survived the other cestuis que trustent, and ultimately, if he became the sole survivor, he would get, not only the income, but from that time forward, the capital too. That is one continuing interest, gradually increasing, increasing by steps; and the events having occurred on which the forfeiture was to take effect for the reasons I have stated, you have then to look at the terms of the gift over on the forfeiture for the purpose of determining what is the extent of the forfeiture. The terms of the gift over are these: "such beneficiary shall forfeit his or her share which shall thereupon devolve as hereinbefore provided in case of his or her death." Therefore, on the occurrence of the bankruptcy not annulled before the first payment was due and receivable, the result was, under the very terms of the forfeiture clause, that Ernest Forder's share was forfeited and was thereupon to devolve as provided in case of his or her death. Obviously, what would happen would be that he would lose the income of the share which would be divisible, and which would go in the first place to his sister, and afterwards go to whom it might be under the tontine system, and of course he would also on his death lose the chance of having his interest in the income increased to the total interest in the capital.

In my view, therefore, the judgment of the learned judge cannot be sustained, and the appeal must be allowed.

LAWRENCE L.J. I agree. The first point taken by Mr. Hurst is that the forfeiture clause is so framed as to operate not only during the subsistence of life and reversionary interests but also after the ultimate absolute interest in the capital has become vested in possession, and that consequently the whole clause is void as being repugnant. This point,

although taken before Clauson J., is not mentioned in the judgment of the learned judge, because in view of his decision on the main point it became unnecessary to deal with it. In my opinion the point is not a good one. The terms of the gift over (whereby the share is to devolve as provided in case of the death of the beneficiary) seem to me clearly to indicate that the forfeiture clause is limited to cases where the bankruptcy has occurred, or the act or thing has been done or suffered before the beneficiary has become entitled in possession to the ultimate absolute interest. This circumstance in my judgment distinguishes the present case from *In re Smith.* (1)

The next and main point is one of some difficulty. The learned judge has held on the facts proved before him that the annulment of Ernest Forder's bankruptcy was in time to prevent a forfeiture of his share. Further evidence has, however, been adduced on this appeal, which, in my opinion, is all-important in determining whether the annulment was in fact in time or not. I think that the learned judge was clearly right in view of the authorities in ruling out on the one hand the contention that an annulment of the bankruptcy at any time, however late, would be in time to save forfeiture, and on the other hand, the contention that no annulment of the bankruptcy after the death of the tenant for life would be in time to save the forfeiture. The real difficulty in the present case lies in determining whether on the facts as now proved the annulment, which did not take place until after the lapse of nearly four months from the death of the tenant for life, was or was not in time to save the forfeiture. From the fresh evidence it appears plainly that the main part of the income of the estate was derived from weekly and quarterly rents, and that it was largely in excess of what was required for repairs, rates and taxes and other outgoings; it further appears from this evidence that it had been the custom of the trustees from time to time to make substantial payments to the beneficiaries on account of income and to distribute the balance of the income half-yearly. During the four

(1) [1916] 1 Ch. 369.

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months after the interest of Ernest Forder had become vested in possession, and whilst his bankruptcy remained effective, the plaintiff as the sole surviving trustee of the will had, in accordance with the usual practice, made payments on account of income to or on behalf of the appellant and to himself. The plaintiff was himself entitled to two-fifths of the income, and the effect of the payment to himself (which, in the absence of evidence to the contrary, must, I think, be assumed to have been properly made) was in my opinion not only to show that as trustee he had in his hands available for distribution amongst the other beneficiaries equivalent proportionate amounts of income, but also to impose upon him an obligation if called upon immediately to pay over equivalent proportionate amounts on account of income to the persons entitled to the remaining three-fifths of the income. At the date when the plaintiff made these payments to himself the only person who in the absence of the forfeiture clause could have given a discharge for a moiety of the remaining three-fifths of the income bequeathed to Ernest Forder, was his trustee in bankruptcy, and the question to be determined is whether in view of the practice now proved to have been adopted in the administration of the estate of making payments on account, and in view of the fact that such payments on account were actually made to or on behalf of the other beneficiaries after Ernest Forder's interest had become vested in possession and before the annulment of his bankruptcy, such annulment came too late to save the forfeiture of his share in the estate.

In determining this question it is necessary to have regard to the relevant authorities. In *White* v. *Chitty* (1) the tenant for life was in occupation of the house in question, and no rent in respect of it had been paid or had become payable before the annulment, and consequently the annulment was held to be in time.

In *Lloyd* v. *Lloyd* (2) the bankrupt was entitled to a life interest in a share of residue and the bankruptcy was annulled

(1) L. R. 1 Eq. 372. (2) L. R. 2 Eq. 722.

before the expiration of one year from the death of the testatrix, that is to say, before the residue had been ascertained and before any payment of income in respect of the share of residue could successfully have been claimed; it was therefore held that the annulment was in time.

In *In re Parnham's Trusts* (1) the bankruptcy was annulled before the interest of the bankrupt had become vested in possession, and therefore before the trustee in bankruptcy could have claimed, or was entitled to receive the income of the share, consequently the annulment was held to be in time.

In *Ancona* v. *Waddell* (2) Hall V.-C. held that the annulment of the bankruptcy took effect substantially within five months of the death of the testatrix and before, to quote his words: "It could be said that there was any actual income of the share which could be treated as payable to, or retained for or appropriated for the benefit of this residuary legatee," and he consequently held that the annulment was in time to save the forfeiture.

In *Robertson* v. *Richardson* (3) the assignment by the trustee in the liquidation of the debtor took place nearly twelve months after the debtor's interest had become vested in possession, and it was held by Pearson J. that, although the trustee had never made any claim to the interest, yet that as he was the person who had become entitled to receive the income after the debtor had become entitled in possession, the forfeiture clause operated. The learned judge remarked that the circumstance relied upon in *White* v. *Chitty* (4); *Lloyd* v. *Lloyd* (5); and *Ancona* v. *Waddell* (2) in order to escape from the forfeiture clause—namely, that no right to receive the income in question had accrued to the assignee in bankruptcy, was wanting in the case before him, and accordingly that he was bound to decide that the forfeiture clause took effect.

(1) 46 L. J. (Ch.) 80.
(2) 10 Ch. D. 157, 162.
(3) 30 Ch. D. 623.
(4) L. R. 1 Eq. 372.
(5) L. R. 2 Eq. 722.

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In *Metcalfe* v. *Metcalfe* (1) the annulment took place more than three years after the beneficiary had become entitled in possession, and in the meantime the income had been paid to the other beneficiary on the footing that the forfeiture clause had taken effect, and the Court of Appeal affirming Kekewich J. held that the annulment came too late. Lindley L.J. puts the crucial test in the form of a question: "Was there ever a time after the death of the testator at which the other legatees were entitled to demand from the trustees of the will payment of the bankrupt's share," and he answers that question by saying: "It is impossible to say there never was such a time." Bowen L.J. pointed out that the authorities had not carried the matter further than holding that an annulment would be in time to save the forfeiture in cases in which no right to have anything paid over had accrued to the trustee in bankruptcy, and he approves of the decision in *Robertson* v. *Richardson*. (2) Fry L.J. held that the time at which the right of the parties was to be regarded was the time at which it first became the duty of the trustees to make the payment.

In the case of *In re Loftus-Otway* (3) the bankruptcy petition was dismissed three months after the beneficiary had become entitled in possession; during those three months the trustees had received the income of the debtor's share, and they stated in an affidavit that at the end of the second month they would have in hand about 450*l.* on account of such income. Stirling J. in those circumstances held that as the petition had not been got rid of before the end of the second month the forfeiture took effect.

In *In re Laye* (4) a receiving order was made against the tenant for life after he had become entitled in possession and remained in operation for about two and a half months, and Eve J. held that if any income came to the hands of the trustees during that time the life interest was determined. From the declaration made by the learned judge, and from the inquiry which he directed, it seems clear that what the

(1) [1891] 3 Ch. 1, 5.
(2) 30 Ch. D. 623.
(3) [1895] 2 Ch. 235.
(4) [1913] 1 Ch. 298.

learned judge decided was that the life interest would be determined if during the time when the receiving order was in operation the trustees had received income which would have become payable to the tenant for life if the receiving order had not been made.

Although the expressions used by the learned judges in the cases I have mentioned differ in language, they do not, in my opinion, differ in substance. In all the cases in which the annulment has been held to be in time to save the forfeiture, no income had been received in respect of the property which could properly have been treated as distributable, or of which the beneficiaries could have required payment. Whereas in all the cases in which the annulment has been held to come too late, income had been received by the trustees which, during the operation of the bankruptcy, had become distributable.

The principle to be deduced from the cases in my opinion is that the annulment will be in time to save forfeiture if it takes place before any income becomes payable to the beneficiary, but it will not be in time to save the forfeiture if it takes place after the trustees have received income which can properly be treated as payable to or as retained or appropriated for the beneficiary.

If that be the true principle, then, in my opinion, the facts which have now been proved show clearly that before the annulment the plaintiff had received income which was payable to and was retained for Ernest Forder and which moreover after the payments made by the plaintiff to himself ought to be treated as appropriated to Ernest Forder.

There remains the further question whether, assuming that the annulment was not in time to save the forfeiture of the interest of Ernest Forder in the income of one half of three-fifths of the residue which was then vested in him in possession, it was in time to save the forfeiture of his contingent reversionary interest in the rest of the income and in the capital of the estate? Mr. Hurst relied upon the decision of Kekewich J. in *Metcalfe* v. *Metcalfe* (1), which

(1) 43 Ch. D. 633.

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was not appealed against on this point, in support of the proposition that in the present case the annulment was in time to save the forfeiture of all Ernest Forder's contingent reversionary interests, even though it may not have been in time to save the forfeiture of his interest in the income of one half of three-fifths of the residue. In my opinion this proposition is not well founded. On the true construction of the forfeiture clause it seems to me clear that if the annulment is not in time to save the forfeiture of the interest which had vested in possession, the inevitable effect of the gift over is to cause the whole share of Ernest Forder, whether in possession or reversion and whether vested or contingent, to devolve as provided by the will in case of Ernest Forder's death.

In my opinion the language of the forfeiture clause leaves no room for the contention that although the forfeiture has taken effect as to the interest in possession, yet it is saved as to the interest in reversion. The other beneficiaries' rights in the whole of the share, both vested and contingent, arise at the moment when the forfeiture becomes effective. The forfeiture clause in the present case differs materially in language from that in *Metcalfe* v. *Metcalfe* (1), and possibly the decision of Kekewich J. may be supported on the special wording of the clause in that case; but if not, then I think that the decision on this point was wrong and ought not to be followed.

In the result the appeal must be allowed.

Appeal allowed.

Solicitors: *Lake & Son; Smith, Fawdon & Low.*

(1) 43 Ch. D. 633.

R. M.

In re OLIVER.

THEOBALD *v.* OLIVER.

TOMLIN J.
1927
June 17.

[1925. O. 105.]

Trustee—Executor and Trustee same Person—Claim for Breach of Trust—Alleged Payment of Liabilities of Testatrix—Executor holding on express Trusts—Appropriate Statute of Limitation—Real Property Limitation Act, 1874 (37 & 38 *Vict. c.* 57), *s.* 8—*Trustee Act*, 1888 (51 & 52 *Vict. c.* 59), *s.* 8.

A testatrix who died in 1890 gave her residuary real and personal estate to two persons whom she appointed her executors upon trust for sale and conversion, and out of the proceeds to set aside a sum of 2000*l.* upon trust to pay the income to L. during widowhood and after L.'s death or marriage to fall into residue and subject thereto gave the proceeds of sale of the residue to her six children in equal shares. L. died in 1916. This action was commenced in 1925 by persons interested in a share of residue against the personal representatives of the two executors, who were dead, claiming a declaration that certain sums of Consols and bank stock had been wrongfully expended or disposed of by or converted to the use of the executors and an order that these sums should be replaced. The defendants alleged that these sums had been expended in 1894 in satisfying liabilities of the testatrix, and pleaded the appropriate statute of limitation. The executors had set aside sums to answer the 2000*l.* legacy in part, and on L.'s death payments of capital were from time to time made to the persons interested in remainder, the last payment being made in June, 1921. It was admitted that if the stock had been paid away in 1894 the statute of limitation afforded a good defence except in regard to the share of the 2000*l.* legacy, which only fell into possession in 1916 :—

Held (1.), that as the claim was against executors holding on express trusts, it was not a claim to recover a legacy within the Real Property Limitation Act, 1874, s. 8, and that the statute of limitation applicable was therefore the Trustee Act, 1888, s. 8, under which the period for which the statute had to run in order to afford a defence was only six years ; (2.) that the payments relied on, being payments in respect of the part of the testatrix's estate accounted for, did not constitute an acknowledgment of liability in regard to that part which the executors were said to have misapplied ; and therefore (3.) that the statute afforded a good defence in regard to the share of the 2000*l.* legacy also.

ACTION.

By a settlement dated June 16, 1879, and made in contemplation of the marriage of the Rev. Rees Grimsdal Gronow and Adela Gronow (then Adela Oliver), Adela Gronow assigned property to trustees upon trust for herself

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for life restrained from anticipation with remainder to her husband for life, with remainder to the issue of the marriage as therein mentioned. And Adela Gronow covenanted to settle after acquired property.

By her will dated July 7, 1883, Elizabeth Oliver (hereinafter called "the testatrix"), after making certain bequests, devised and bequeathed all the residue of her real and personal estate to her sons, Frederick William Oliver and Edgar Oliver, upon trust to sell and convert the same into money and thereout to set apart the sum of 2000*l.* (hereinafter called "the 2000*l.* legacy"), the interest on which was to be paid to her daughter, Laura Elizabeth Oliver, so long as she should continue unmarried, and on her death or marriage the 2000*l.* legacy was to fall into residue. And subject thereto the testatrix directed the trustees for the time being of her will to stand possessed of the net residue of the proceeds of sale of her real and personal estate upon trust for her six children in equal shares. And the testatrix appointed Frederick William Oliver and Edgar Oliver to be her executors.

There were two codicils to the will by which some additional bequests were made. The testatrix died on February 13, 1890, and the will and codicils were proved on March 6, 1890, by the named executors.

Adela Gronow was one of the testatrix's six children, and pursuant to the covenant to settle after acquired property her interest under the will was vested in the trustees of the settlement of June 16, 1879.

For probate purposes the testatrix's estate was sworn at 5842*l.* 10*s.* 2*d.* personalty and 9568*l.* 5*s.* 2*d.* realty and the debts at 1356*l.* 18*s.* 8*d.* It appeared from the executors' accounts that from time to time during 1891 cash amounting to 5953*l.* 0*s.* 6*d.* was invested by the executors in sums amounting to 5267*l.* 5*s.* 1*d.* Consols and 271*l.* 17*s.* 4*d.* bank stock, no part of which was ever paid to the beneficiaries under the testatrix's will.

Frederick William Oliver died insolvent on July 7, 1899, and the defendant, Frederick Gronow Oliver, was his sole executor.

On August 28, 1900, Edgar Oliver paid a sum of 2000*l*., part of the testatrix's estate, to the personal representatives of Pelham Lytton Hollis, and a further sum of 2000*l*. to William Henry Hollis.

Laura Elizabeth Oliver died on December 7, 1916, Edgar Oliver died on October 14, 1918, and the defendant, Nancy Vera Oliver, was his sole surviving executrix.

From time to time sums had been set aside by the executors to answer the 2000*l*. legacy to the extent of 1700*l*. or thereabouts, but the whole sum of 2000*l*. was never set aside and no payment of any kind was ever made in respect of the general residue, apart from the 2000*l*. legacy. After Laura Elizabeth Oliver's death capital payments were made in respect of Adela Gronow's share of the 2000*l*. legacy—namely, 117*l*. 16*s*. 3*d*. paid in September, 1917; 56*l*. 4*s*. 7*d*. paid in September, 1920; and 36*l*. 10*s*. 6*d*. paid in June, 1921.

The plaintiffs, who were the existing trustees of the settlement of June 16, 1879, brought this action, claiming a declaration that the above sums of Consols and bank stock had been wrongfully expended by and converted to the use of the executors or one of them or, alternatively, wrongfully transferred or disposed of by or converted to the use of the executors or one of them, and that the estates of the executors were liable in respect thereof and an order that these sums should be replaced; and also claiming a declaration that the two sums of 2000*l*. were wrongfully expended by Edgar Oliver and an order that these sums should be replaced.

The defendants by their defence alleged that in the administration of the estate of the testatrix claims were made by members of the family of Thomas Cadell, and in particular by his grandchildren, Pelham Lytton Hollis and Montague William Henry Hollis, who claimed to be creditors of the estate or to be beneficially entitled to certain of the assets in the following circumstances.

William Elliott Oliver, the testatrix's husband, was at his death sole surviving trustee of the will of Thomas Cadell, and of a settlement in favour of Helena Hollis (a daughter of Thomas Cadell) and her issue, and as such trustee held

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certain trust funds (hereinafter called "the Hollis trust funds"). He died in 1877, having by his will appointed the testatrix his sole executrix and residuary legatee, and the Hollis trust funds became vested in the testatrix, who intermingled them with the assets of her husband's estate. In her lifetime he admitted that certain sums of Consols and bank stock were part of the Hollis trust funds. After the death of the testatrix these sums of stock or others substituted for them and the proceeds of sale thereof were dealt with in 1894 by the executors paying 3152*l.* 18*s.* 1*d.* cash, being the value of half the said stocks, to Montague William Henry Hollis, and transferring sums of 2633*l.* 12*s.* 6*d.* Consols and 147*l.* 5*s.* 4*d.* bank stock representing the other half on forged powers of attorney. The latter sums were subsequently made good by the Bank of England and paid in 1903 to Pelham Lytton Hollis. In respect of further claims by the Hollis family the further two sums of 2000*l.* each mentioned above were paid by Edgar Oliver by way of compromise.

The defendants therefore claimed that these payments and transfers had been properly made, and they also pleaded in defence such of the statutes of limitation as might be applicable.

At the hearing of the action it was admitted that as regards the two sums of 2000*l.* paid away in 1900, the statutes of limitation afforded a complete defence, and this part of the action was dismissed. As regards the sums of 5267*l.* Consols and 271*l.* 17*s.* 4*d.* bank stock the defendants admitted that if payments exhausting these were proved to have been made in 1894, the statutes of limitation would afford a complete answer except in regard to so much of the plaintiffs' claim as related to Adela Gronow's share of the 2000*l.* legacy. By consent an inquiry was directed as to what had become of the sum of 5267*l.* Consols and 271*l.* 17*s.* 4*d.* bank stock, and the only question argued was whether, assuming that these sums had been paid away in 1894, any statutes of limitation prevented the plaintiffs from claiming in respect of Adela Gronow's share of the 2000*l.* legacy in view of the fact that it did not fall into possession until the death of Laura Elizabeth Oliver in 1916.

Farwell K.C. and *P. R. D. Shufeldt* for the plaintiffs. As the tenant for life of the 2000*l.* legacy only died in 1916 the statute of limitations has not run against the plaintiffs' claim so far as regards Mrs. Gronow's share of that legacy in reversion. The action is one to recover a legacy, and the Real Property Limitation Act, 1874, s. 8, applies: *In re Richardson* (1); and as twelve years has not run since the tenant for life's death the action is not barred. But even if the proper period was six years under the Trustee Act, 1888, s. 8, the application of the statute would be excluded by the payments from time to time, the last of which was made in June, 1921.

Gavin Simonds K.C. and *Andrewes-Uthwatt* for the defendants. The statute applicable in this case is the Trustee Act, 1888, s. 8, so that the claim was barred after six years from 1916. Further, the payments on account of the residuary estate do not take the case out of the protection afforded by the statute. This is an action for breach of trust in misapplying part of the testatrix's estate, how then can the payment to the beneficiaries of the remainder of that estate constitute an admission that these additional funds were payable to the beneficiaries? The only real question is whether the statutory period is six years or twelve years. It can only be twelve years if the case falls within the Real Property Limitation Act, 1874, s. 8. That section has no application to an express trust by which residue is settled. In such a case the residuary legatee, although so called, is not the person "capable of giving a discharge" within the meaning of the section. Thus when the executors and trustees are different persons, the residuary legatee cannot sue the executors unless the trustees refuse to do so, and then he must make them parties. This is because the persons who can give a receipt are the trustees. When the executors and trustees are the same persons the residuary legatee sues for his legacy by right of the trustees, and in such a case no question can arise of the period only running in the case of a settled legacy from the death of the tenant for life, because

(1) [1920] 1 Ch. 423.

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the action is brought in right of the trustees. The twelve years therefore runs from the end of the executors' year. On the other hand the action, if an action for breach of trust, is brought in a case like the present against the executors as trustees and not as executors, and the Trustee Act, 1888, s. 8, applies: *In re Swain* (1); *In re Timmis.* (2)

[TOMLIN J. You suggest that the plaintiffs are in a dilemma. If the action is brought against the estates of the executors for their acts as executors, it can only be brought by the legatee in right of his trustees, and if so no question arises of the statute only beginning to run from the falling into possession of the reversion, because the action must be treated as an action by the trustees. If the action is really brought by the beneficiaries, that can only be an action against trustees.]

Yes. And the explanation of *In re Richardson* (3) is that in that case there was a direct gift to the residuary legatee of residue, and it was not given through the medium of trustees. That case is no authority for saying that twelve years will run in the case of a settled legacy from the death of the tenant for life.

Farwell K.C. in reply. The claim here is for a share of residue, that is, to recover a legacy, and the Real Property Limitation Act, 1874, s. 8, applies. It may be that the 2000*l.* legacy was held by the executors as trustees during the life of the tenant for life, but at her death it fell into residue.

[TOMLIN J. Here the residuary estate was given to the executors upon trust for sale and conversion. In acting in any such sale they would be acting as trustees and not executors.]

The question whether the Real Property Limitation Act, 1874, s. 8, or the Trustee Act, 1888, s. 8, applies in a case of breach of trust must depend on its nature. Supposing the executors had failed to get in an asset, with the result that the residue is insufficient to satisfy the 2000*l.* legacy, the residuary legatees would be entitled to make a claim against them in respect of their default. Here up to 1901 the

(1) [1891] 3 Ch. 233. (2) [1902] 1 Ch. 176.
(3) [1920] 1 Ch. 423.

executors were acting as such, and paying claims against the testatrix's estate.

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[TOMLIN J. What is pressing me is that if there had been separate trustees and they had sued the executors for the legacy, their claim would have been barred after twelve years from the end of the executors' year. Must not the same be true when the executors and trustees are the same persons and the legatee sues ?]

It is suggested that the legatee would have a higher right.

Again the trustees are in no better position than an ordinary debtor and the payments on account of the indebtedness prevent the statute from running.

[TOMLIN J. Can you say that the payment of an asset got in can be an acknowledgment of indebtedness in respect of an asset not got in ?]

It is an acknowledgment of an indebtedness of 2000*l.* : compare the language of the Real Property Limitation Act, 1874, s. 8. The plaintiffs are really suing for their share of the whole 2000*l.* legacy and giving credit for the amount already paid.

[TOMLIN J. Is an action to make executors liable for a devastavit an action to recover a legacy at all ?]

No doubt it is an action for damages for devastavit in one sense. But the plaintiffs are seeking to recover the legacy by making the executors pay a sum which they ought to have in their hands. The liability of the executors is not only for what they have in their hands, but also for what they ought to have.

Simonds K.C. The plaintiffs' action is not to recover a legacy, but an action against trustees for breach of trust. Here the residue was vested in the executors on express trusts, and the action is for breach of those trusts. It follows that the Real Property Limitation Act, 1874, s. 8, does not apply : *In re Davis.* (1) And apart from a case falling within that section it is impossible to contend that the payments on account of the testatrix's estate prevented the statute from running.

(1) [1891] 3 Ch. 119.

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TOMLIN J. [after stating the facts and that the plaintiffs admitted that if in fact the sums of Consols and bank stock were parted with as alleged, then, whether or not they were properly parted with, the defendants could rely on the Statutes of Limitation as affording them a complete defence, subject only to the question whether that was so in so far as they claimed in respect of the 2000*l.* legacy, continued :] There are, however, two points upon which there may be more difficulty. It is said in regard to the plaintiffs' claim, so far as it is a claim to implement the 2000*l.* legacy, that, first, the statute of limitation applicable only began to run on the death in 1916 of the testatrix's daughter Laura, the tenant for life, and that under the statutes applicable the period for which the statute must run in order to afford a defence was twelve years ; and, secondly, that there have been since the death of the daughter Laura payments which take the case out of the statute. The payments which are alleged to take the case out of the statute are those made by way of distribution of the fund set aside to answer the 2000*l.* legacy pro tanto amongst the residuary legatees after the death of the tenant for life.

The first question is which statute applies, because it is plain that if the statute which applies is the statute of James I., as made applicable by the Trustee Act, 1888, the six years has long since run, and will be an answer to the claim unless anything can be made of the alleged payments. The twelve years' period can only be relevant if this is the case of an action to recover a legacy within the meaning of s. 8 of the Real Property Limitation Act, 1874. The first thing I have to consider is, what is the nature of this action. And for the purpose of arriving at a conclusion upon the matter I must have regard to the parties and the nature of the claim. In the ordinary way where there is a settled legacy and the beneficiaries have ground of complaint, their claim is against their trustees for failure to carry out their trust either by dealing improperly with the funds that have come to their hands or by failing to recover from the executors, if separate persons, that which was properly payable to them. Such

an action is not an action to recover a legacy, nor, indeed, is an action against the executor an action to recover a legacy if it be brought to recover funds which are held by him upon express trusts. In this particular case I do not think it is necessary for me to consider and determine what is the exact position of a beneficiary, where the same person is both executor and trustee, and the beneficiary sues that person in respect of some act which strictly is an administrative act of the executor, because it seems to me plain that the present action is against the legal personal representatives of two executors who are alleged to have held funds on an express trust. They did in fact under the will hold the residue on express trusts, because the form of the gift to them of the residuary estate is upon trust for sale and conversion and to hold the proceeds upon the trusts mentioned in the will. Therefore they are sued as trustees holding upon an express trust the particular funds which are specified in the claim, and as having parted with those funds in breach of trust and so rendered themselves liable to make good the loss occasioned by the breach. That being so, the case does not fall within s. 8 of the Act of 1874, but is a case where before the Act of 1888 there would have been no statute applicable; therefore under the Act of 1888 the statute applicable is the Jacobean Act, and six years is the appropriate time.

If that is true the only question that remains is as to the effect of the payments. Under the Jacobean statute there is no statutory provision that payments may amount to an acknowledgment taking the case out of the statute; but the common law has always recognized that payment on account of something in respect of which the statute is set up may amount to a fresh promise to pay and found a fresh cause of action. Subject to the provisions of the Statute of Frauds Amendment Act, 1828, which made it necessary that any such acknowledgment should be in writing, that holds good to-day; but it seems to me plain that any payment which is to have that effect must be a payment made in respect of that which it is sought to recover. When,

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therefore, the action is an action to make a defendant liable for improper dealing with a particular sum which has been in his hands as an express trustee, it is impossible to say that a payment made by him in respect of some other sum for which he has properly accounted can be an acknowledgment of his liability in respect of that which he is alleged to have dealt with improperly. If that be so, the payments relied on do not serve to take the case out of the statute, and having regard to the dates in this case, the statute must, in my opinion, be an answer to the claim in respect of the settled legacy as well as in respect of the unsettled part of the residue, on the assumption that the payment away is ultimately established.

That only leaves one other point. It is suggested that, supposing the defendants succeed in establishing that the money was in fact paid away and by reason of the statute are not liable to make good, there is still some claim against them on the ground that they ought to have recovered duty. I confess I feel some difficulty in dealing with that at this stage, because the matter has not been raised upon the pleadings; and I do not propose to adjudicate upon it in any way. If the parties desire I will give some opportunity, by inquiry or otherwise, for the question to be raised in chambers when the rest of the matter is being dealt with; but I do not think it would be proper for me to express to-day any opinion about it.

[His Lordship then directed an inquiry what had become of the sums of 5276*l.* 5*s.* 1*d.* Consols and 271*l.* 17*s.* 4*d.* bank stock, and an inquiry whether any and what duty ought to have been recovered as overpaid and, if so, when the same ought to have been recovered.]

Solicitors: *Fowler, Legg & Young; Farrer & Co.*

H. C. G.

PALMOLIVE COMPANY (OF ENGLAND), LIMITED *v.* FREEDMAN.

ASTBURY J.

1927

May 26, 27.

[1926. P. 2657.]

Restraint of Trade—Price Maintenance Agreement—Proprietary Article—"Howsoever acquired"—Validity.

In consideration of being placed on the plaintiffs' wholesale list and allowed their wholesale discount the defendant, a wholesaler and retailer, agreed (inter alia) not to sell Palmolive soap "howsoever acquired" to the public under sixpence a tablet:—

Held, that the agreement was not in general restraint of trade, but only imposed a restriction in respect of a proprietary article with which the defendant was not bound to deal, and consequently, notwithstanding the non-severability of the wide term "howsoever acquired," the agreement was reasonable and could be enforced by injunction.

Elliman, Sons & Co. v. *Carrington & Son* [1901] 2 Ch. 275; *Dunlop Pneumatic Tyre Co.* v. *Selfridge & Co.* [1913] W. N. 46; 29 Times L. R. 270; *Dunlop Pneumatic Tyre Co.* v. *New Garage and Motor Co.* [1915] A. C. 79; *Attorney-General of the Commonwealth of Australia* v. *Adelaide Steamship Co.* [1913] A. C. 781; and *North Western Salt Co.* v. *Electrolytic Alkali Co.* [1914] A. C. 461 discussed and applied.

WITNESS ACTION.

The plaintiffs were vendors of Palmolive toilet soaps and toilet preparations which they bought from their parent company in Canada.

The defendant, who carried on business as "The Economical Bazaars," had one wholesale warehouse and many retail branch shops at which he sold (inter alia) Palmolive toilet soap and preparations. By the custom of the trade he was treated as a wholesaler.

On August 10, 1926, the plaintiffs sent a circular letter to the defendant and other wholesale customers explaining the advantages of a price maintenance agreement which they enclosed, together with a circular to the retailers and another agreement for them to sign.

On August 23, 1926, the defendant signed this wholesalers' agreement. It was headed "Price Agreement" and addressed to "The Palmolive Company (of England), Ld. (hereinafter referred to as the company)." It provided as follows: "In consideration of the company agreeing to

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place my name upon the list of those entitled to purchase and sell Palmolive preparations at wholesale and allowing me the current wholesale trade discount for the time being I agree with you from this date :—

(*a*) To sell Palmolive preparations howsoever acquired only to customers approved by you and with your consent, such approval and consent to be assumed in the case of our regular customers unless you have in writing vetoed any sales to such customers.

(*b*) Not to sell barter or otherwise supply Palmolive preparations to or for sale to any other wholesaler without the written consent of the company.

(*c*) To maintain the prices of Palmolive preparations in respect of sales to retailers at the prices listed on the back of this agreement under the heading 'Price list for the retail trade' and in respect of sales to the public at the prices listed on the back of this agreement under the heading 'Prices to the consumer' or at such other prices as shall from time to time be fixed by the company in respect of both classes of sales and not to sell such preparations howsoever acquired at less than such fixed prices."

The consumer's price for Palmolive soap was fixed at sixpence a tablet.

This agreement was sent to the plaintiffs on August 25 with a letter asking them to expedite delivery of a previous order for Palmolive soap. The soap was delivered on wholesale terms.

On September 14 the defendant ordered more soap from the plaintiffs' traveller, telling him he had already signed the price agreement. At the traveller's request he signed an identical agreement ex abundanti cautela. This order was then executed on wholesale terms. For simplicity these two identical agreements are hereinafter referred to as one.

Shortly after this the defendant, finding that many shops were selling Palmolive soap under sixpence a tablet, followed their example, and declined to be bound by his agreement. He now obtained his soap from independent wholesale and retail sources, though the retailer's agreement provided that

the retailer would not sell Palmolive preparations under the listed prices and would not supply them to or for sale to any other retailer or wholesaler.

On December 22, 1926, the plaintiffs commenced this action for an injunction.

On January 21, 1927, Astbury J. granted an interlocutory injunction until the trial in respect of soap supplied by the plaintiffs, but at the trial the plaintiffs asked for an injunction in respect of Palmolive soap "howsoever acquired."

The defendant's case was that the contract was in restraint of trade, contrary to public policy and illegal. It imposed on the defendant a greater restriction than was reasonably required for the plaintiffs' protection, and the restraint was not reasonable in the public interest. The contract was non-severable and therefore bad as a whole. Even if severable the restriction as to soap "howsoever acquired" was invalid.

Jowitt K.C. and *Courtney Terrell* for the plaintiffs. The words "howsoever acquired" are really mere surplusage, as even without them the agreement would clearly cover all Palmolive soap whatever its source. It is not therefore worth while to discuss "severability" cases such as *Attwood* v. *Lamont* (1) or *Putsman* v. *Taylor*. (2) The agreement is valid and enforceable as it stands. It only applies to specific proprietary articles, with which the defendant is not bound to deal unless he chooses, and it is no wider than the ordinary tied-house agreement. There is no general restraint of trade at all in this case.

In *Elliman, Sons & Co.* v. *Carrington & Son* (3) an equally wide contract was enforced in damages. The present point, as to the source of supply, though apparent on the face of the contract, was not raised. The same remark applies to *Palmolive Co. (Australasia), Ld.* v. *McCaskie* (4), where an injunction was granted on the retailer's contract. It also applies to *Dunlop Pneumatic Tyre Co.* v. *Selfridge & Co.* (5), where Phillimore J. granted an injunction on an equally

(1) [1920] 3 K. B. 571.
(2) [1927] 1 K. B. 637, 741.
(3) [1901] 2 Ch. 275.
(4) (1925) 26 N. S. W. S. R. 212.
(5) [1913] W. N. 46; 29 Times L. R. 270.

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wide contract. His decision was reversed by the Court of Appeal (1) and the House of Lords (2) on the ground of non-privity of contract, not touching the restraint of trade point. [The judgments of Phillimore J. and the Court of Appeal are printed in the House of Lords Appendix, pp. 107, 116, Bar Library Collection, vol. 257.]

Phillimore J. had previously granted another injunction on the same contract in *Dunlop Pneumatic Tyre Co.* v. *New Garage and Motor Co.* (3), and ordered an inquiry as to damages. The Master assessed the damages at 5*l.* a tyre, the sum provided by the contract as liquidated damages for breach, and awarded 250*l.* This was the only point appealed. The Court of Appeal held that the 5*l.* a tyre was a penalty and gave 2*l.* only in all as nominal damages. The House of Lords held that the 5*l.* was liquidated damages and reversed the Court of Appeal. Both Courts must, however, have treated the contract as ex facie valid or they would not have dealt with it at all: see *North Western Salt Co.* v. *Electrolytic Alkali Co.* (4)

The judgments of Phillimore J. and the Court of Appeal in the *New Garage* case (3) are printed in the House of Lords Appendix, pp. 35, 129, Bar Library Collection, vol. 248.

If the restraint is reasonable between the parties, the onus of showing that it is detrimental to the public lies on the party so asserting: *Attorney-General of the Commonwealth of Australia* v. *Adelaide Steamship Co.* (5) See also *Nordenfelt* v. *Maxim Nordenfelt Guns and Ammunition Co.* (6)

Archer K.C. and *P. B. Morle* for the defendant. This agreement, being clearly in restraint of trade, is only enforceable if it complies with two conditions. First, it must be reasonable in the interests of the contracting parties. Secondly, it must be reasonable in the interests of the public: *Joseph Evans & Co.* v. *Heathcote.* (7)

Now if the agreement had been limited to soap obtained from the plaintiffs, it would have been reasonable in both

(1) [1914] W. N. 59.
(2) [1915] A. C. 847.
(3) [1915] A. C. 79.
(4) [1914] A. C. 461.
(5) [1913] A. C. 781, 796.
(6) [1894] A. C. 535, 552, 553.
(7) [1918] 1 K. B. 418, 429.

aspects, but, as it expressly includes soap "howsoever acquired," it is wholly unreasonable.

The scheme is almost entirely ineffective, and, having regard to the enormous retail undercutting, its enforcement against the defendant would practically prevent him dealing in Palmolive soap at all.

In *Elliman, Sons & Co.* v. *Carrington & Son* (1) the breach was in respect of goods purchased from the plaintiffs. In *Dunlop Pneumatic Tyre Co.* v. *New Garage and Motor Co.* (2) the infringing sale was a sale of goods bought from the proprietors. It may well be that in both cases the contract was treated as impliedly limited to goods so acquired. Phillimore J.'s judgment in the latter case was not appealed. The only appeal was as to the assessment of damages. (3) The case, so far as the higher Courts are concerned, is no authority as to the validity of the contract.

ASTBURY J. [after stating the facts:] The only question I have to decide and which, in some respects, is a difficult one, is, whether the defendant's agreement can be enforced in this Court. The only difficulty is the term under which he agrees to maintain this price maintenance rate, not only in respect of soap purchased by him from the plaintiffs, but in respect of Palmolive preparations "howsoever acquired."

The plaintiffs admit that an agreement in partial restraint of trade, such as this is, must be reasonable, in the interests of the parties and of the public. The general legal effect of price maintenance agreements has lately been considered so often that I do not propose to discuss it in any

(1) [1901] 2 Ch. 275.

(2) [1915] A. C. 79.

(3) Swinfen Eady L.J. said (House of Lords Appendix, p. 138): "From that [assessment of damages at 5*l.* per tyre] there is an appeal to this Court. Now, there is no appeal from the judgment in the action, and we have not to consider any questions as to whether the plaintiffs could in fact maintain this action: they are in possession of a judgment. Nor have we to consider at all whether the injunction was properly granted; there is no appeal from that: a very difficult question might arise out of that. But the sole question raised on this appeal is whether on the agreement 5*l.* for every tyre sold or offered for sale in breach of the agreement is a penalty or is liquidated damages. That is the sole point which in this case, at this stage, arises for decision."

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detail. If the defendant had contracted to maintain this price maintenance agreement only in respect of articles purchased by him from the plaintiffs, it is not suggested that there would be anything further to say; but it is with respect to the additional term "howsoever acquired," which I think is not severable, that the question arises.

It has been seriously contended that because the defendant finds other shopkeepers in London breaking this agreement, or selling under 6*d.* per tablet, the soap which is the particular preparation in question, he is therefore entitled to break his contract, as, otherwise, he could not compete with his other shop or retail competitors.

Now, in a scheme of this character it is really in the interests of the purchasers as well as of the plaintiffs that a reasonable and proper price for these commodities should, if possible, be maintained. There is no evidence at all before me that the contract prices are other than reasonable from a trader's and purchaser's point of view. The plaintiffs are naturally faced with the difficulty that all traders in their position are faced with at the commencement of a scheme of this character—namely, that there will always be people and firms who will try to undersell and cut prices. It is quite true that if the defendant abides by his contract, he may, in a diminishing number of cases, find himself being competed with by people who are doing the same kind of thing that he has done. But if he honestly abides by his contract, until the scheme now launched is fully established, as it undoubtedly will be if the plaintiffs continue their present arrangements, it is a mere question of time how soon the scheme will be universally complied with, and how soon those who carry out their contract will obtain better profits and their undesirable competitors will be eliminated.

The consideration for this contract is apparently good on the face of it. The injury to the plaintiffs, if they are entitled to set up a scheme of this character, is just the same whether their customers break their agreement in respect of soap purchased from the plaintiffs or in respect of soap purchased from outsiders, at a price enabling undercutting to take place.

This is, of course, no case of general restraint of trade, but a restraint in respect of a particular proprietary article, which the defendant is under no obligation to purchase or deal with at all. The public suffer quite as much injury from unfair dealing in the one case as the other.

By way of analogy the plaintiffs mentioned various instances where a much greater and widespread restraint is perfectly valid under the law as it now exists, as, for instance, in the case of tied-house trade. But I do not propose to go through those, and I will consider now the only authorities which have been found in which this question as to the contract applying to soap and articles not purchased from the plaintiffs direct has been dealt with.

In *Elliman, Sons & Co.* v. *Carrington & Son* (1) the plaintiffs, who were manufacturers of goods, sold them to wholesale traders under a contract whereby the purchasers bound themselves not to sell the plaintiffs' goods for less than certain specified prices, and if they sold to the trade to procure a similar signed agreement from every retailer they supplied. The purchasers sold goods to retailers without procuring such an agreement. Kekewich J. held that the contract was not in restraint of trade and the plaintiffs could maintain an action for the breach. The contract there, as here, was not limited to goods purchased by the purchasers from the plaintiffs. The point taken in the present case was not even argued there. Kekewich J. gave judgment for the plaintiffs, on the contract, and said (2): "The defendants' point is that they cannot be sued upon this written contract into which they have entered because it is in restraint of trade. In one sense no doubt it is so, because one of the contracting parties is not at liberty under the contract to do what he pleases with the goods which he purchases. But it is necessary to see what the contract really is. The plaintiffs are the manufacturers of Elliman's Royal Embrocation for horses and cattle, and Elliman's Universal Embrocation for human beings. They are not bound to sell the embrocation at all; they are not bound to manufacture it. They are at liberty

(1) [1901] 2 Ch. 275. (2) [1901] 2 Ch. 278.

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to do as they please, and when they have manufactured it they are at liberty to sell it at whatever price they choose to fix—it may be a prohibitive one, or it may be such a small price that they cannot make any profit out of it. That is entirely for their consideration. Carrington & Son "—that is the defendants—" are minded to buy Elliman's embrocation with a view to selling it again—that is, to buy wholesale in order to sell to others retail, and Ellimans make a bargain with them that they shall not sell it below certain prices—that part of the bargain has not been broken—and that when they sell to others they will procure from those others an agreement that they will not sell it below certain prices." That was the question of breach in that case, and the learned judge says: "Why should not Messrs. Elliman be at liberty to fix the price in that way? Nobody has argued, and it could not possibly be argued, that they are not at liberty to fix the price on the first sale to Carrington & Son. Why should they not be at liberty to make the further bargain with Carrington & Son that they shall not sell it below a certain price? It is said that it is in restraint of trade. In one sense it is, but it is just as much and no more in restraint of trade for Ellimans to say that they will not sell at all. It seems to me that what is restraint of trade as regards Carrington & Son is really the liberty of trade as regards Ellimans. . . . . It is merely a question whether a man is entitled when he is selling his own goods to make a bargain as to the use to be made of them by the purchaser. It is said that the contract is against public policy." He disagrees with that and grants relief. The contract there was as wide as this one, but the point taken in the present case was not argued there.

Then there are two Dunlop cases. The first is *Dunlop Pneumatic Tyre Co.* v. *Selfridge & Co.* (1), which I read from the Times Law Reports. There the contract was that the purchaser should not sell Dunlop tyres below a certain price, and on any breach 5*l.* a tyre should be paid as liquidated damages. The contract was as wide as the present one.

(1) [1913] W. N. 46; 29 Times L. R. 270, 271.

Phillimore J. said: "There remained the question of restraint of trade. As to that, he agreed with . . . . *Elliman, Sons & Co.* v. *Carrington & Son* (1), and held that there was no restraint of trade in this contract. Price maintenance agreements were modern things and were strange to those who had been brought up on older lines, but they were in almost universal commercial use, and it would be a scandal if they could not be enforced." That was Phillimore J.'s view on a contract as wide as the present. That decision went to the Court of Appeal (2) and to the House of Lords. (3) Phillimore J.'s order was discharged on other grounds altogether, and the question now in dispute and the passage in his judgment which I have read were not dealt with.

The second Dunlop case is *Dunlop Pneumatic Tyre Co.* v. *New Garage and Motor Co.* (4) The action was tried before Phillimore J. The contract there covered goods purchased from the plaintiffs or from any one else, and although the particular breach was in respect of a tyre purchased from the plaintiffs, the injunction that was granted restrained the defendants from selling or offering any Dunlop motor tyres, covers or tubes, below the prices fixed by the contract. On the inquiry as to damages the Master awarded 250*l.*, being 5*l.* a tyre, the sum mentioned in the contract as liquidated damages for breach. This assessment was appealed. The contract was treated as valid, but the Court of Appeal, by a majority, holding that the 5*l.* was a penalty, reduced the damages to 2*l.* nominal damages. The House of Lords in their turn held that the 5*l.* was liquidated damages and reversed the Court of Appeal, so that the original assessment stood.

Now, it is said, and perfectly truly, that the question which I am discussing in the present case was not argued there, but I find it difficult to believe that the House of Lords and the Court of Appeal would have dealt at length with a contract which was invalid on the face of it if such had been the case. This was a contract exactly as in the present

(1) [1901] 2 Ch. 275.
(2) [1914] W. N. 59.
(3) [1915] A. C. 847.
(4) [1915] A. C. 79.

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case, restraining a person who was supplied with goods from selling goods of that class under a certain fixed price. The consideration for that contract was that the manufacturers were willing to make him one of the distributors, or customers. The House of Lords dealt with that contract at great length on the question of penalty or damages, and there is no suggestion, either in the arguments or in the judgments in the House of Lords or the Court of Appeal, that the contract was otherwise than valid.

The plaintiffs rely on two other authorities of a different character. The facts have very little relation to the present case, but certain passages are relied on.

The first is *Attorney-General of the Commonwealth of Australia* v. *Adelaide Steamship Co.* (1) That is a case where a so-called "corner" in coal of a certain description was made between certain contracting parties, and the question in the Privy Council was, whether that was a contract to the detriment of the public within an Australian statute which was referred to. In the judgment delivered by Lord Parker there are certain passages which I will refer to shortly. "At common law every member of the community is entitled to carry on any trade or business he chooses and in such manner as he thinks most desirable in his own interests, and inasmuch as every right connotes an obligation no one can lawfully interfere with another in the free exercise of his trade or business unless there exist some just cause or excuse for such interference." (2) Then after referring to contracts in restraint of trade, Lord Parker says (3): "Though, speaking generally, it is the interest of every individual member of the community that he should be free to earn his livelihood in any lawful manner, and the interest of the community that every individual should have this freedom, yet under certain circumstances it may be to the interest of the individual to contract in restraint of this freedom, and the community if interested to maintain freedom of trade is equally interested in

(1) [1913] A. C. 781. (2) [1913] A. C. 793.
(3) [1913] A. C. 795.

maintaining freedom of contract within reasonable limits." Then he deals with the case before the Court, the facts of which are not particularly relevant. Later again he says (1): "It is, however, in their Lordships' opinion, clear that the onus of shewing that any contract is calculated to produce a monopoly or enhance prices to an unreasonable extent will lie on the party alleging it, and that if once the Court is satisfied that the restraint is reasonable as between the parties this onus will be no light one. Further, it must be remembered that the question whether a restraint of trade is reasonable either in the interest of the parties or in the interest of the public is a question for the Court, to be determined after construing the contract and considering the circumstances existing when it was made. It is really a question of public policy and not a question of fact upon which evidence of the actual or probable consequences, if the contract be carried into effect, is admissible." Later on there is this passage (2): "It was also strongly urged that in the term 'detriment to the public' the public means the consuming public, and that the Legislature was not contemplating the interest of any persons engaged in the production or distribution of articles of consumption. Their Lordships do not take this view." Then there are passages on pp. 809 and 810, to the effect that consumers, in the long run, will suffer if the manufacturer or the producer is not permitted to make a reasonable profit in a reasonable way.

The second case relied on is *North Western Salt Co.* v. *Electrolytic Alkali Co.* (3) The facts are not very relevant to anything that I have to discuss, but the effect of the decision is this: "Where an action is brought on a contract which is ex facie illegal as being in unreasonable restraint of trade, the Court will decline to enforce the contract, irrespective of whether illegality is pleaded or not." The judgments in that case, considered in respect to the later decisions in the Dunlop cases, are very important in estimating the true effect and

(1) [1913] A. C. 796. (2) [1913] A. C. 801.
(3) [1914] A. C. 461.

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result of the way in which the Dunlop contract was treated by the House of Lords.

In the *North Western Salt Co.'s* case (1) Viscount Haldane L.C. said: "When the controversy is as to the validity of an agreement, say for service, by which some one who has little opportunity of choice has precluded himself from earning his living by the exercise of his calling after the period of service is over, the law looks jealously at the bargain; but when the question is one of the validity of a commercial agreement for regulating their trade relations, entered into between two firms or companies, the law adopts a somewhat different attitude—it still looks carefully to the interest of the public, but it regards the parties as the best judges of what is reasonable as between themselves."

In the present case the public can hardly be said to be interested in the price providing it is a reasonable one which the plaintiffs fix as being necessary to maintain if they are to continue their trade, and, in my opinion, the defendant when he made his contract was perfectly capable of judging whether it was reasonable on his part and to his advantage to contract as he did in consideration of having the very generous terms offered to him thereby.

For these reasons I am of opinion that the defendant has not discharged the onus which is upon him of showing that his contract which he entered into is invalid in law. No facts have been proved which render it, in my opinion, unreasonable in the circumstances. That being so, I am of opinion that the plaintiffs are entitled to succeed, and there will be an injunction restraining the defendant from committing breaches of his contract, and the defendant will pay the costs. The injunction will follow the terms of the contract.

Solicitors: *Stock & Slater; Armitage & Craig.*

(1) [1914] A. C. 471.

G. R. A.

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[1926. D. 2201.]

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[1926. D. 1913.]

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Trade Mark—Word used for more than Two Years to indicate Manufacturer's Goods—Registration in Part B of Register—Descriptive Word which became Distinctive—Passing Off—Probability of Deception—Evidence required—Trade Marks Act, 1905 (5 *Edw.* 7, *c.* 15), *s.* 9, *para.* 5; *s.* 44—*Trade Marks Act*, 1919 (9 *&* 10 *Geo.* 5, *c.* 79), *ss.* 2, 4.

A fancy word capable of being distinctive is not disqualified for registration as a trade mark merely because it is also descriptive in the sense of suggesting some quality of the goods.

The expression "capable of distinguishing" in s. 2, sub-s. 2, of the Trade Marks Act, 1919, has a somewhat wider import than the expression "adapted to distinguish" in s. 9 of the Trade Marks Act, 1905, as interpreted by the authorities, in that it embraces marks which have not at the date of the application to register, but which, if used long enough, may thereafter, become distinctive of the goods of the proprietor of the mark.

Upon an application under s. 2 of the Act of 1919 for registration in Part B of the register of trade marks of a mark which has been in actual use for two years it is not necessary for the applicant to prove that the mark has actually become distinctive. It is sufficient for him to satisfy the registrar that it is not incapable of becoming distinctive.

The plaintiff having for more than two years used the marks "Davis' Ustikon" and "Ustikon" to indicate that rubber soles for boots were of his manufacture, applied for and obtained registration of the two trade marks in Part B of the register under s. 2 of the Act of 1919. At a time when "Ustikon" applied to goods indicated both to the trade and to the public that the goods were manufactured by the plaintiff the defendants used the word "Justickon" to place on their rubber soles. In an action by the plaintiff for infringement and passing off and on a motion by the defendants to rectify the register by removing the plaintiff's marks:—

Held (affirming the decision of Russell J.), that the mark "Ustikon" was at the time of its registration capable of distinguishing, and did in fact distinguish, the plaintiff's goods, and was therefore rightly placed on the register.

Held, also, that the defendants' mark "Justickon" was an infringement of the plaintiff's mark "Ustikon"; that there was a likelihood of deception owing to the close resemblance of the two words, and that the plaintiff was therefore entitled to an injunction to restrain the defendants from using their mark "Justickon."

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THE plaintiff was the registered proprietor of two trade marks, "Davis' Ustikon," and "Ustikon," which he had used in connection with rubber soles for boots and shoes since December 15, 1919, to indicate that the rubber soles were of his manufacture. In 1924 the plaintiff applied for and obtained registration in Part B of the register of the two marks under s. 2 of the Trade Marks Act, 1919. After the plaintiff had carried on business for some time, in the course of which he had made substantial sales, and spent substantial sums in advertising, so that both to the trade and the public "Ustikon" indicated the plaintiff's goods, the defendants, who were also manufacturers of rubber soles, selected the word "Justickon" to place on their goods. The plaintiff thereupon brought this action in which he asked for an injunction to restrain the defendants from infringing his said two trade marks and from passing off, as the plaintiff's, soles and heels not of his manufacture by the use of the word "Justickon" upon or in connection therewith. The defendants called no evidence to prove that "Ustikon" was not adapted to distinguish the plaintiff's goods.

There was also a motion by the defendants to rectify the register by expunging therefrom the plaintiff's trade marks.

The action came on for hearing before Russell J. on April 7, 1927.

Moritz K.C. and *K. E. Shelley* for the plaintiff. For more than two years the plaintiff used the marks "Davis' Ustikon" and "Ustikon" to denote that the goods were of his manufacture. Under s. 2 of the Trade Marks Act, 1919 (1), he applied for and was registered, in Part B of the register, as proprietor of the two marks and therefore, under s. 4 of the Act (1), there is prima facie evidence that he has the

(1) Trade Marks Act, 1919, s. 2, sub-s. 1: "Where any mark has for not less than two years been bonâ fide used in the United Kingdom upon or in connection with any goods (whether for sale in the United Kingdom or exportation abroad), for the purpose of indicating that they are the goods of the proprietor of the mark by virtue of manufacture, selection, certification, dealing with or offering for sale, the person claiming to be the proprietor of the mark may apply in writing to the registrar in the prescribed manner to have the mark entered as his registered trade mark in Part B of the register in respect of such goods."

exclusive right to use those trade marks. The fact that the trade marks are descriptive of the goods is no ground for refusal of registration if they have become distinctive: Trade Marks Act, 1905, ss. 9, 44. The onus is on the defendants to show that the words are not distinctive and they have called no evidence. It is submitted the evidence on behalf of the plaintiff shows that the trade marks are distinctive of his goods. That being so it is obvious that "Justickon" is an infringement of "Ustikon."

It is not necessary to call evidence to show that persons would be likely to be deceived by the use of the word "Justickon." The eyesight of the judge is the ultimate test: *Bourne* v. *Swan & Edgar, Ld.* (1)

Sir Duncan Kerly K.C. and *J. Ewart Walker* for the defendants. You must show either that the words are not properly descriptive, or that the trade has been so large (here it was insignificant) in extent and so widely known that the primary signification in respect of the goods is lost and a secondary signification has attached to the words so that they

Sub-s. 2: "The registrar shall consider every such application for registration of a trade mark in Part B of the register, and if it appears to him, after such search, if any, as he may deem necessary, that the application is inconsistent with the provisions of s. 11 or s. 19 of the principal Act, or if he is not satisfied that the mark has been so used as aforesaid, or that it is capable of distinguishing the goods of the applicant, he may refuse the application, or may accept it subject to conditions, amendments or modifications as to the goods or classes of goods in respect of which the mark is to be registered, or to such limitations, if any, as to mode or place of user or otherwise as he may think right to impose, and in any other case he shall accept the application."

Sect. 4: "The registration of a person as the proprietor of a trade mark in Part B of the register shall be primâ facie evidence that that person has the exclusive right to the use of that trade mark, but, in any action for infringement of a trade mark entered in Part B of the register, no injunction, interdict or other relief shall be granted to the owner of the trade mark in respect of such registration, if the defendant establishes to the satisfaction of the Court that the user of which the plaintiff complains is not calculated to deceive or to lead to the belief that the goods the subject of such user were goods manufactured, selected, certified, dealt with or offered for sale by the proprietor of the trade mark."

(1) [1903] 1 Ch. 211, 225; 20 R. P. C. 105.

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mean goods made by the plaintiff: *Weingarten Brothers* v. *Rosenthal.* (1) A word, not being an invented word, ought not to be put on the register, if the spelling is phonetic and resembles in sound a word which in its proper spelling could not be put on the register. Where "Orlwoola" was the registered word Cozens-Hardy M.R. said: "It is plain that 'all wool' could not be registered. . . . . This word is a mark which appeals to the ear far more than to the eye": *In re H. N. Brock & Co.* (2), and he held the word was not distinctive. The same is true of "Ustikon." The Court will not permit the registration of ordinary laudatory epithets such as "best," "perfect," "classic," whatever be the amount of user proved: *W. N. Sharpe, Ld.* v. *Solomon Bros., Ld.* (3) Under s. 2 of the 1919 Act the mark must have been used to indicate that the goods are the goods of the proprietor of the mark. In this case the mark was used to indicate that the goods were of a particular kind—namely, that they were capable of being stuck on. Under s. 4 registration is only prima facie evidence that the word is distinctive of the goods and that evidence may be displaced. The evidence for the plaintiff was principally that of wholesalers, and merely went to prove that they understood that "Ustikon" meant the plaintiff's goods. The evidence that the public understood the word in the same sense was very slight. As to passing off the plaintiff has neither proved that any one was deceived nor that there was any probability of any one being deceived.

RUSSELL J. This is an action by the plaintiff to restrain an alleged infringement of a trade mark and an alleged passing off. For more than two years before registration the plaintiff had used in respect of rubber soles the marks "Davis' Ustikon" and "Ustikon." When the necessary time had elapsed the plaintiff applied for and obtained registration of the two marks under s. 2 of the Trade Marks Act, 1919. The class in respect of which he was registered was rubber

(1) (1904) 21 R. P. C. 212, 215.
(2) [1910] 1 Ch. 130, 143; 26 R. P. C. 850, 855, 856.
(3) (1914) 32 R. P. C. 15, 26.

soles. After he had carried on business, using these marks, for some time, in the course of which he made substantial sales, the defendants adopted the word "Justickon" for use in connection with their goods. So far as the eye is concerned, the only difference between that word and the plaintiff's mark is the affixing of the letter "J" before the initial letter "U," and the insertion of "c" in the middle of the word before the letter "k." So far as the ear is concerned, the plaintiff's is "Ūstikon" or in some cases pronounced "Us-tik-on," while the defendants' is "Jū-stick-on." Those are the rival marks and the plaintiff complains of the use by the defendants of the mark "Justickon."

Sect. 4 of the Act of 1919 provides that "The registration of a person as the proprietor of a trade mark in Part B of the register"—that is this case—"shall be primâ facie evidence that that person has the exclusive right to the use of that trade mark." It is common ground that the effect of the Trade Marks Acts, as they stand at present, is that for a mark to be properly and validly on the register, and to be entitled to continue on the register, it must be adapted to distinguish the goods of the registered owner. The question is, is this word "Ustikon" adapted to distinguish the goods of the plaintiff? As I read s. 4, that section throws the onus upon the defendants to prove that the mark is not adapted to distinguish the goods of the plaintiff. So far as the action consists of passing off the onus is the other way.

Now is the word "Ustikon" descriptive of the goods to which it applies? In one sense, Yes. The evidence shows that there are two classes of rubber soles, one class being soles which you nail on, the other class being soles that you stick on. The defendants say that "Ustikon" is a purely descriptive word indicating that the soles in question belong to the class which you stick on. As I read the authorities which have been cited, a word which is so descriptive as to be unable to acquire a secondary meaning and become distinctive, ought not to be on the register, and it makes no difference whether the mark in question is a word or phrase correctly spelt, or, as in the present case, fantastically spelt,

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because marks such as these appeal at least as much to the ear as to the eye. The cases also show that since the Act of 1905 the mere fact that a word is descriptive, or has a descriptive flavour, does not necessarily prevent that word being distinctive of a person's goods. In my opinion that is the plain result of language used by Fletcher Moulton L.J. in *In re H. N. Brock & Co.* (1) He said: "Much of the argument before us on the part of the opponents and the Board of Trade was based on an assumption that there is a natural and innate antagonism between distinctive and descriptive as applied to words, and that if you can shew that a word is descriptive you have proved that it cannot be distinctive. To my mind this is a fallacy. . . . . The notion that there is such an incompatability is confined to lawyers, and is, in my opinion, due to the influence of the earlier Trade Marks Acts. By these Acts, which are now repealed, the fact that words were descriptive of the goods was fatal to their registration as trade marks, and thereby being treated by the law as distinctive of the goods of a particular maker. But the question whether a word is or is not capable of becoming distinctive of the goods of a particular maker is a question of fact, and is not determined by its being or not being descriptive. The law has never refused to recognize that this is the case, or to give protection to descriptive trade marks when once duly established in fact, although (except in the case of old marks) they refused registration and left the owners to obtain protection in another form of action."

That amounts to this, that under the old Trade Marks Acts, except in particular or exceptional cases, you could not register a word which was in any way descriptive, but if in fact it had become distinctive of a person's goods, that person could obtain protection by a common law action of passing off. The learned Lord Justice continued (2): "This is now changed, and under the provisions of the present Act" —that is the Act of 1905—" the Court clearly has power to allow descriptive words to be registered if a case on the merits is proved before it sufficiently strong to induce it to do so.

(1) [1910] 1 Ch. 130, 145; 26 R. P. C. 850, 857. (2) [1910] 1 Ch. 146.

The language of s. 9, sub-s. 5, puts this beyond doubt; but if any doubt upon the point could remain it would be set at rest by the language of s. 44, which provides that 'No registration under this Act shall interfere with . . . . the use by any person of any bonâ fide description of the character or quality of his goods,' clearly indicating that a registered trade mark may have as its essential part words capable of being used descriptively." It appears to me impossible to establish at the present day that because a word is descriptive, or has a descriptive flavour, it cannot also be distinctive of a person's goods, and be properly registered as a trade mark.

Turning now to the evidence in the present case, it stands in this way. As I have pointed out, the onus under s. 4 of the Act is on the defendants. They have called no evidence at all upon this point and Mr. Moritz, appearing for the plaintiff, is right in saying that under the terms of the section, if he had chosen simply to prove his registration and had called no evidence himself and the defendants had only called the two witnesses they did call and those witnesses had deposed to the same evidence they did depose to, he must have succeeded, the defendants would not have discharged the onus or attempted to discharge it. But witnesses were called by the plaintiff who were cross-examined, and I need hardly say acutely cross-examined, by the learned counsel for the defendants. I have heard those witnesses. I have read their evidence and have considered it and am quite satisfied on their evidence that in this line of goods in this trade the word "Ustikon" means the plaintiff's goods. The criticism passed upon the evidence by Sir Duncan Kerly was that it was evidence mainly of wholesalers, of persons coming from a more or less restricted area, so that at the highest all it came to was that with a particular class of people and within a particular area, the word "Ustikon" had become distinctive of the plaintiff's goods. I do not take that view. I think the evidence covered a wider field than Sir Duncan suggested. True it was in the main the evidence of wholesalers. There is no doubt at all in my

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mind that in the wholesale trade the word "Ustikon" meant the plaintiff's goods; but some of the witnesses called (there were three of them altogether) were retailers who came in contact with the public, and their evidence satisfied me that among the public, among the consumers, persons who buy goods over the counter, "Ustikon" meant the plaintiff's goods. That is the oral evidence. In addition to that the plaintiff produced a very considerable number of trade orders and private orders from which it was quite clear that the persons giving the orders and using the word "Ustikon" meant, and necessarily meant, the plaintiff's goods.

The plaintiff has done a substantial amount of advertising, and he has done quite a substantial trade in these goods, and I am satisfied by the evidence here, as a question of fact, that "Ustikon" does mean the plaintiff's goods, "Ustikon" is adapted to distinguish the plaintiff's goods, and does in fact distinguish the plaintiff's goods.

That being so, was there infringement? Assuming I am right that the plaintiff is properly registered in respect of a valid trade mark, "Ustikon," he would be a bold man who would say that a mark consisting of the word "Justickon" was not an infringement. It might be argued that it is a bare-faced infringement, but that it is an infringement in fact I have no doubt.

There remains the question of passing off. I am satisfied that "Ustikon" means the plaintiff's goods, but it is said that the plaintiff has proved neither actual deception nor any likelihood of deception. There is only slight evidence of the likelihood of deception. There is evidence the other way as regards persons in the trade, but it would require a very subtle instance of passing off to deceive a person in the trade. It is a deception which is not very often met with. But I am entitled to use my own intelligence assisted by the evidence given. As pointed out by Farwell J. in *Bourne* v. *Swan & Edgar, Ld.* (1), it is not necessary to show actual passing off nor is it necessary to call persons actually to say: "If I did see the particular mark I would be

(1) [1903] 1 Ch. 211, 224; 20 R. P. C. 105.

deceived." Such a class of witness is not easily obtained. But the Court is entitled to use its own intelligence and its own eyesight. There is no similarity I agree in the get-up, but the likelihood of deception arises solely from the very close resemblance between the two words, the plaintiff's trade mark "Ustikon" and the defendants' word "Justickon."

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For these reasons I think the plaintiff is entitled to succeed in the action. Accordingly I grant an injunction in the terms asked for in the statement of claim and I order the defendants to pay the costs of the action.

There is a motion to rectify the register which of course necessarily follows the result of the action. It fails and must be dismissed with costs.

J. B. B. M.

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The defendants appealed, both against the decision in the action and also against the decision on the motion to rectify. The two appeals were heard together on June 20 and 21, 1927.

Sir Duncan Kerly K.C. and *J. Ewart Walker* for the appellants.

Moritz K.C. and *K. E. Shelley* for the respondent.

The arguments were substantially the same as those used in the Court below.

The following cases were referred to: *Slazenger & Sons* v. *Feltham & Co.* (1); *Lloyd's* v. *Lloyd's (Southampton), Ld.* (2); *In re "Uneeda" Trade Mark* (3); *Bourne* v. *Swan & Edgar, Ld.* (4); *Burberrys* v. *Cording & Co.* (5); *Weingarten Brothers* v. *Rosenthal* (6); *In re Joseph Crosfield & Sons, Ld.* (7); *Hommel* v. *Bauer & Co.* (8); *In re Gramophone Co.'s Application.* (9)

Cur. adv. vult.

June 29. The following judgments were delivered:—

LORD HANWORTH M.R. The question that arises in these two appeals is whether the plaintiff's trade mark "Ustikon"

(1) (1889) 6 R. P. C. 531.
(2) (1912) 29 R. P. C. 433.
(3) [1902] 1 Ch. 783.
(4) [1903] 1 Ch. 211.
(5) (1909) 26 R. P. C. 693.
(6) 21 R. P. C. 212.
(7) [1910] 1 Ch. 130.
(8) (1904) 22 R. P. C. 43.
(9) [1910] 2 Ch. 423.

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is a good trade mark and whether an injunction ought to be granted to restrain the defendants from infringing the plaintiff's mark and passing off their goods as and for the goods of the plaintiff by the use of the word "Justickon." Russell J. on April 13 dismissed the motion to expunge the plaintiff's mark from the register and granted a perpetual injunction from passing off by the use of the word "Justickon."

Now these words "Davis' Ustikon" and "Ustikon" are words which have been registered under s. 2 of the Act of 1919. By the Act of 1919 the register of trade marks has been divided into two parts, and by s. 2 there can be a registration of trade marks in Part B under circumstances which are stated in that section; that is to say, where a mark has been used for not less than two years bona fide in connection with any goods for the purpose of indicating that they are the goods of the proprietor, then, when that preliminary condition precedent is satisfied, the registrar is to consider any application for registration of the mark and, if it appears to him that, for reasons which are indicated in the section, it ought not to be registered, he need not register it; but, if the condition is satisfied, then he may register it. The words in the section are: "If he is not satisfied that the mark has been so used as aforesaid"—that is to say, for two years—"or that it is capable of distinguishing the goods of the applicant, he may refuse the application." Putting it conversely, the acceptance by the registrar of a word and his placing it upon the register connotes that he is satisfied that the word-mark has been used for two years for the purpose of indicating that the goods are the goods of the proprietor of the mark and that such a mark is capable of distinguishing the goods of the applicant. I may say in passing that, if it is established that the mark has been used for two years for the purpose of indicating that the goods are the goods of the proprietor, it would almost seem to follow that such a mark is capable of distinguishing the goods of the applicant.

What is obtained when such a mark is registered is indicated by s. 4 of the Act of 1919. By that section it is declared

that "The registration of a person as the proprietor of a trade mark in Part B of the register shall be primâ facie evidence that that person has the exclusive right to the use of that trade mark," and then it indicates that the mark may be challenged in this sense, that in any action for infringement no injunction or other relief shall be granted in respect of such registration, if the defendant establishes to the satisfaction of the Court that the user of which the plaintiff complains is not calculated to deceive or to lead to the belief that the goods the subject of the user were manufactured, selected, certified, dealt with or offered for sale by the proprietor of the trade mark. There still remains the right to rectify the register, under s. 35 of the principal Act, where there has been an entry on the register without sufficient cause and specifically ss. 11 and 19 are retained. In passing, I may say that I agree with the argument that was presented to us by Sir Duncan Kerly that, when the registration of a mark in Part B is challenged, it may be challenged in other ways than by leading evidence. In fact it may be challenged by a scrutiny and criticism of the word and consideration of the relevant authorities.

In the course of the arguments addressed to us, Mr. Moritz gave a useful historical summary, beginning from the Act of 1883 and then dealing with s. 9 of the Act of 1905, which still remains in force. Under s. 9 of the Act of 1905 it is not necessary now to apply to the Board of Trade, but a mark may be registered upon evidence of its distinctiveness; and "distinctive" still means adapted to distinguish the goods of the proprietor of the trade mark from those of other persons. It is said, and perhaps with some force, that the use of a different phrase in s. 2 of the Act of 1919, namely, "capable of distinguishing," as compared with the words used in s. 9 of the Act of 1905, "adapted to distinguish," may indicate that a somewhat more benevolent test may be applied under s. 2 of the Act of 1919 than is necessitated under the Act of 1905, because "capable of distinguishing" is a little different from "adapted to distinguish." There is ground, in my judgment, for saying that "capable of distinguishing" may

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perhaps refer to the future, in the sense that a word may be able to distinguish although at the moment of time at which the application is made it may not have become fully effective to distinguish.

However that may be, the question that we have to determine is whether or not this word "Ustikon" is distinctive. It is said that the word is only descriptive of the method of the attachment of these soles to shoes or boots in contradistinction to nailing them on, that what the plaintiff intended the persons to understand who read or made use of the word "Ustikon" was that it connoted the power of fixing by some sticky attachment and rendered nailing on unnecessary. We therefore have to consider whether or not this word is merely descriptive of a method to be used or whether it is distinctive as well as descriptive, for it has been laid down in *In re Joseph Crosfield & Sons, Ld.* (1)—perhaps not for the first time—but it has been definitely laid down that a word may be both descriptive and at the same time become distinctive. That is to be found in the judgment of Fletcher Moulton L.J. (2) Sir Duncan Kerly contends that this word is merely a misspelling of an ordinary English phrase and that, if it were so, it would fall within the objection stated by Lord Herschell in *Eastman Photographic Materials Co.* v. *Comptroller-General of Patents, Designs, and Trade-Marks* (3), where he says: "I do not think the combination of two English words is an invented word, even although the combination may not have been in use before; nor do I think that a mere variation of the orthography or termination of a word would be sufficient to constitute an invented word, if to the eye or ear the same idea would be conveyed as by the word in its ordinary form." Now, it is quite plain that words which indicate quality and no more and words which are merely misspelt cannot be registered. Quoting again from the same case, Lord Halsbury puts the proposition in this way (4): "Of course also words which are merely misspelt,

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(1) [1910] 1 Ch. 130.
(2) Ibid. 145.
(3) [1898] A. C. 571, 581.
(4) Ibid. 577.

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but which are nevertheless, in sound, ordinary English words, and the use of which may tend to deceive, ought not to be permitted." There is no doubt that the line is somewhat difficult to draw. *In re "Uneeda" Trade-Mark* (1) is an illustration to which I need not refer more; but you may have a word on the other side of the line, a word which has acquired or is capable of acquiring a distinctive meaning. Vaughan Williams L.J. in *Hommel* v. *Bauer & Co.* (2) says: "In all these cases if the primary meaning of a word is a simple and easy primary meaning, known to everybody, it is extremely difficult to establish that in any particular trade this word has lost its well-known and original meaning, and in that trade acquired a secondary meaning to the exclusion of the natural and original meaning of the word. And, of course, this difficulty is not nearly so strong or so difficult to get over in a case where the word which is applied is a word of which the meaning is not one which would be known to everyone who came in contact with the word."

The word "Ustikon" seems to be a word which is equivocal. I doubt very much whether, whatever its original origin or purpose may be, those who read this word "Ustikon" would understand from it that it did mean that you were to use sticky material as opposed to nailing on. Still, it must be remembered that you cannot claim a word by spelling it fantastically or phonetically and otherwise than from its usual spelling. A full discussion of that sort of point took place in *In re H. N. Brock & Co.* ("*Orlwoola*") (3) and ultimately it becomes a question of fact: Has this word, which can be criticized as being a misspelling or phonetic spelling of an ordinary word or sentence, become adapted to distinguish or capable of distinguishing? Fletcher Moulton L.J. says (4): "But the question whether a word is or is not capable of becoming distinctive of the goods of a particular maker is a question of fact, and is not determined by its being or not being descriptive."

(1) [1902] 1 Ch. 783.
(2) 22 R. P. C. 43, 48.
(3) [1910] 1 Ch. 130.
(4) Ibid. 146.

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Now, Russell J. heard the evidence in this case and he is the person to appraise its value and measure its weight. In his judgment he says this: "I have heard those witnesses. I have read their evidence and have considered it and I am quite satisfied on their evidence that in this line of goods in this trade the word 'Ustikon' means the plaintiff's goods." Further on he says: "I am satisfied by the evidence here, as a question of fact, that 'Ustikon' does mean the plaintiff's goods, 'Ustikon' is adapted to distinguish the plaintiff's goods and does in fact distinguish the plaintiff's goods." Now, those findings are extremely important and I should be very reluctant to set aside the findings of Russell J. after he had obviously taken the trouble, not once but twice, to consider the full value of the evidence and, inasmuch as he is satisfied that this word falls on the side of the line of words which are adapted to distinguish and capable of distinguishing. I am not prepared at all to disagree with him and I accept that finding. That being so, this word, although its origin may have been from an effort to convey an idea by misspelling, seems to be a word which, so to speak, has lost its origin and, on the evidence before him, Russell J. has definitely found that the word "Ustikon" meant and necessarily meant the plaintiff's goods.

Accepting that finding, it appears to me that, within the authorities, this word is a word which is rightly upon the register and rightly to be protected as indicating the goods of the plaintiff.

The only other question left is whether or not the use of the word "Justickon" is an infringement or likely to lead to deception in respect of the goods on which it is placed. It appears now that the user of this word has been abandoned; but, nevertheless, as the matter stood before Russell J., in my opinion he was right in treating the word "Justickon" as an infringement and, therefore, on that part of the case, too, his judgment must be upheld.

For these reasons I think that the appeal fails and both appeals must be dismissed with costs.

SARGANT L.J. The determination of these two appeals involves somewhat different considerations.

As regards the second appeal, that in the action, the plaintiff has rights independent of his registration. The learned judge, relying mainly on the undoubted similarity of the two marks, both as written and as spoken, and partly on the necessarily slight evidence that was before him, has come to the conclusion that there would be a probability of confusion between the defendants' goods and the plaintiff's goods. And though it may be urged that this would be at least partly due to the adoption by the plaintiff of a mark to describe a quality of the goods which is common to both sets of goods, I do not think that this common element sufficiently explains or justifies the similarity in name. The judge, after having seen the witnesses, obviously disbelieved the story told by the defendants as to the brain-wave which was said to have produced the earlier part of the word "Justickon," and considered that this word was suggested, though perhaps unconsciously, by the knowledge of the defendants' agents as to the plaintiff's mark. And such a suggestion, even if unconscious, is in itself an indication of similarity likely to lead to confusion. Apart, therefore, from any question of fraud, which was not pleaded, there was, in my judgment, material sufficient to justify an injunction against passing off. The exact form of the injunction would no doubt be slightly different if it protected a trade name, or common law trade mark only, and not a registered trade mark. But this would be of little, if any, importance, since the defendants have expressly disclaimed any intention of using the word "Justickon" in future.

The second appeal, namely, that in the application to remove the word "Ustikon" from the register, is of more general importance, since it involves a consideration of the modifications with regard to the registration of trade marks which have been introduced by the Trade Marks Act, 1919. This Act materially decreases the difficulties in getting marks, and particularly word-marks, on the register, and especially on that division of the register thereby constituted as Part B.

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In the first place, it makes a marked alteration in s. 9, para. (5.), of the Act of 1905 in the case of all word-marks other than those within paras. (1.), (2.), (3.) and (4.), by abolishing the requirement that they shall not be deemed distinctive enough for registration except by order of the Board of Trade or the Court, and substituting the far less stringent requirement that a word-mark of the kind shall not be registrable under the provisions of para. (5.) except upon evidence of its distinctiveness.

And in the next place, it demands much less stringent evidence of distinctiveness in actual use than was ordinarily requisite under the last paragraph of s. 9 of the Act of 1905. Under that Act as interpreted in practice the evidence as to distinctiveness had to prove an actual acquired distinctiveness generally throughout the country. But under the Act of 1919 this does not seem to be necessary. Some evidence of distinctiveness has to be given under the alteration to s. 9, para. (5.), just noticed. But so far as this is concerned, the registrar is directed to accept an application to register in Part B unless he is not satisfied that the mark is capable of distinguishing the goods of the applicant. In the result, therefore, in the case of an application for registration in Part B of a mark in actual use for two years it is not necessary for the applicant to prove that the mark has actually become distinctive. It is sufficient for him to satisfy the registrar that it is not incapable of becoming distinctive, a much less strenuous task, and one in which the onus lies rather on the opponents than on the applicant.

Even so, as was admitted by Mr. Moritz, there is a large class of word-marks which are by their very nature incapable of becoming distinctive and which ought, therefore, on a priori grounds, to be refused registration, even in Part B of the register. Such marks are mere laudatory epithets, such as "Good," "Best," "Excellent," "Perfect," and the like, and also marks merely describing in ordinary language some common characteristic of the goods in question, such as in the present case "Stickable," "Attachable" or, as Mr. Moritz admitted, "Stickon," however spelt. And if Mr. Davis had

succeeded in the object at which, according to his own evidence, he aimed—namely, to frame a word-mark which, in its ordinary sense, meant to the buying public that the soles in question could be stuck on by the purchasers themselves without employing a bootmaker, then I think that his word-mark would not have been registrable even in Part B. Such a word-mark, for instance, as "Self-attachable" or "Easy-sticking" must, I think, have been rejected by the registrar. But in fact Mr. Davis in the course of torturing the English language for the purpose of ultimately arriving at the word "Ustikon" has, in my judgment, been fortunate enough to arrive at a combination of letters, which, as ordinarily written or pronounced, would not definitely indicate that which he intended it to indicate, though it might perhaps suggest something with regard to the soles falling within that class of rubber soles which are stuck on rather than nailed on. And I think that there is justification for the view urged by Mr. Moritz that customers first learn the word "Ustikon," the initial "U" being apparently pronounceable as in the word "Us," and later on are educated to recognize the origin and implied meaning of the word in relation to Mr. Davis' soles.

On the whole therefore, though with some doubt, I cannot say that the registrar was bound to decide on a priori grounds that the mark "Ustikon" was incapable of distinguishing Mr. Davis' soles. And this being so, and the other conditions of registration in Part B having been satisfied, the registration was in order and the mark cannot now be taken off. But the case seems to me very near the line. And I hope—perhaps against hope—that the result of this decision will not be to choke Part B of the register with horribly misspelt words, which were originally intended to bear and still to some extent suggest a more or less obvious reference to the ordinary characteristics of the goods they denote.

LAWRENCE L.J. In my judgment Russell J. has reached the right conclusion both in the motion to rectify and in the action.

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The motion to rectify raises a question of some general importance and I propose to deal with it first. It is contended on behalf of the appellants that the mark in question is not registrable and ought to be removed from the register on the ground that it is purely descriptive of the goods in respect of which it is registered and, therefore, is not and cannot become distinctive.

The mark consists of the word "Ustikon," which is a misspelt combination of the words "you stick on" and is registered under the Act of 1919 in Part B of the register in respect of goods in Class 40. It has admittedly been bona fide used by the respondent in the United Kingdom for nearly seven years upon and in connection with rubber soles for boots and shoes manufactured by him and was so used for upwards of two years before the application for registration.

One of the important alterations in the law relating to trade marks effected by the Act of 1919 was the establishment of Part B of the register, in which any mark which has been actually used as a trade mark for at least two years can be registered, even although it may not contain or consist of any of the essential particulars mentioned in s. 9 of the Act of 1905, which section does not apply to registration in Part B.

The registrar, however, may refuse the application for registration, but only on one or more of the following grounds—namely: (1.) that the application is inconsistent with s. 11 of the Act of 1905, (2.) that the application is inconsistent with s. 19 of the Act of 1905, (3.) that he is not satisfied that the mark has been used for at least two years, and (4.) that he is not satisfied that the mark is capable of distinguishing the goods of the applicant. Apart from the discretion conferred upon the registrar in respect of these four matters, he has no such general discretion to refuse an application for registration in Part B as was conferred upon him in respect of applications for registration under the Act of 1905 by s. 12 of that Act and is bound to accept the application: see s. 2, sub-s. 2, and s. 3 of the Act of 1919 and *In re Egg Products' Application.* (1)

(1) (1922) 39 R. P. C. 155.

Registration in Part B of the register, however, confers lower rights on the registered proprietor than registration in Part A, in that such registration does not give him the exclusive right to the use of the mark but is only prima facie evidence that he has such exclusive right and leaves it open to a defendant in an infringement action to prove that the user of which the registered proprietor complains is not calculated to deceive or to lead to the belief that the goods the subject of such user are the goods of such proprietor: see s. 4 of the Act of 1919.

In the present case I assume that the registrar was satisfied that the mark "Ustikon" was capable of distinguishing the goods of the respondent, and the sole question is whether he was right in being so satisfied. If he was, then the mark was rightly placed on the register and the motion to rectify must fail.

It is to be noted that the expression "capable of distinguishing" found in s. 2, sub-s. 2, of the Act of 1919 differs from the expression "adapted to distinguish" in the definition of the word "distinctive" contained in s. 9 of the Act of 1905. The respondent placed some reliance upon this difference in phraseology. The expression "capable of distinguishing" seems to me to have a somewhat wider import than the expression "adapted to distinguish" as interpreted by the authorities in that it embraces marks which have not at the date of the application, but which, if used long enough, may thereafter become distinctive of the goods of the proprietor of the mark.

It is not disputed that "Ustikon" is a word or combination of words coming within the definition of a "mark" contained in s. 3 of the Act of 1905, but the appellants contended that the registrar ought not to have been satisfied that it was capable of distinguishing the goods of the respondent from those of other persons, because when spoken it is purely descriptive of one of the characteristics of the goods and falls into the category of such laudatory epithets as "good," "perfect" and "best" or of such descriptive words as "all woollen," which, it is admitted, are not registrable even in

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the B register. Numerous authorities have been cited to the Court by counsel for the appellants, many of which were decided before the Act of 1905 came into operation and the remainder of which were decided under the Act of 1905. No case has been called to our attention in which the expression "capable of distinguishing" has been construed. The cited authorities, however, are useful in furnishing some guide to the Court in arriving at a conclusion whether a mark is or is not "capable of distinguishing."

It must be remembered that the mere fact that a mark is descriptive or partly descriptive is not fatal to registration either under the Act of 1905 or under the Act of 1919. Sect. 44 of the former Act, which is applicable to marks registered in Part B, recognizes that a trade mark may be descriptive and expressly provides that no registration under the Act shall interfere with the use by any person of any bona fide description of the character or quality of his goods.

Fletcher Moulton L.J. in the "*Perfection*" case (1) says "the question whether a word is or is not capable of becoming distinctive of the goods of a particular maker is a question of fact, and is not determined by its being or not being descriptive."

Bearing these considerations in mind there are, in my judgment, several answers to the contention put forward on behalf of the appellants in the present case. In the first place, the learned judge has found as a fact that the respondent's mark has become distinctive of his goods, and the evidence given at the hearing, in my opinion, fully bears out this finding. In the next place, the respondent's mark does not consist of or represent a word or words which a trader would properly use as a normal description of his goods. The words "stick on" might be used in an adjectival sense to describe one of the characteristics of rubber soles, but the words "you stick on" would not normally be so used. The word "Ustikon" when written or printed cannot be mistaken for the words "you stick on," and when spoken could only be so mistaken if pronounced U-stick-on and not,

(1) [1910] 1 Ch. 130, 146.

as is frequently the case, "Us-tick-on." But be that as it may, the evidence shows clearly that not only wholesalers but also retailers do not confuse an inquiry for "Ustikon" rubber soles (however "Ustikon" may be pronounced) with an inquiry for rubber soles "you stick on."

Some corroboration of the distinctiveness of the mark "Ustikon," moreover, is, in my opinion, afforded by the fact that the appellants, who are well acquainted with the rubber industry (after a meeting with their salesmen, convened for the purpose of selecting a distinctive mark for the rubber soles which they were manufacturing), deliberately chose the word "Justickon," consisting of a misspelt combination of the words "Just stick on." It is true that when the respondent attacked the appellants for infringement they countered the attack with this motion to rectify the register and pleaded in the action that the word "Justickon" was not a distinctive mark, but was a bona fide description of the character of their goods; but the fact remains that when they adopted the word "Justickon," which, for the purpose of distinctiveness, stands on precisely the same footing as the respondent's word "Ustikon," they considered that it was a suitable mark for distinguishing their goods from the goods of other persons.

For the reasons stated I am of opinion that the mark "Ustikon" was at the time of registration capable of distinguishing the goods of the respondent, and that the appeal on the motion to rectify fails and should be dismissed with costs.

There remains the question of infringement and passing off. The learned judge has held that the appellants have infringed the respondent's mark and also that there is a likelihood of the appellants' goods being passed off as and for the goods of the respondent, and has accordingly granted an injunction both against infringement and against passing off.

The learned judge was evidently not much impressed with the evidence given by the two witnesses called on behalf of the appellants, but he has not found that the appellants

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fraudulently adopted the word "Justickon" with the object of obtaining the benefit of the respondent's goodwill. In the absence of such a finding on the part of the learned judge and in the absence of any clear charge of fraud in the pleadings, I think that it is impossible for this Court to hold that the defendants have chosen their mark with any such fraudulent intent, though I confess that I have some difficulty in believing the story as to the origin of the appellants' mark, which strikes me as somewhat fantastical and far-fetched. I agree with the learned judge, however, in thinking that in the present case it is unnecessary to probe into the motives which induced the appellants to choose the word "Justickon."

The appellants' mark contains the whole of the respondent's mark with the sole addition of the two letters "J" and "c." The appellants contended that, so far as the last two syllables of both marks were concerned, they were common to the trade and that the addition of the initial letter "J" sufficiently differentiates their mark from the respondent's so as to prevent it being an infringement or calculated to deceive. In my judgment, this contention is ill-founded. In the first place, I think that for the purpose of judging whether there has been an infringement or whether there is likelihood of deception the whole mark should be looked at, and that it would not be right to ignore altogether that part of the mark which, if standing alone, would be incapable of distinguishing the goods. And, in the next place, even if it were right to ignore the last two syllables of both marks, the distinction between the letter "U" and the letters "Ju" is, in my opinion, not sufficient either when written or when spoken to prevent the latter from being an infringement and from being calculated to mislead.

In arriving at a conclusion as to what resemblance is sufficient to justify an injunction against infringement and passing off, the Court must have regard (inter alia) to the other marks used in the trade, the probable purchasers and the places where the goods are likely to be sold. Taking all these matters into consideration, I agree with the learned judge that the appellants' mark "Justickon" is an infringement

of the respondent's mark "Ustikon" and that there is a likelihood of deception owing to the close resemblance between the two words.

In the result, I am of opinion that the appeal in the action also fails and should be dismissed with costs.

Appeals dismissed.

Solicitors for appellants: *Darling & Taylor.*

Solicitors for respondent: *Cecil Williams & Co.*

W. I. C.

Dicta of SCRUTTON, L.J., at p. 376, *applied.* INDUSTRIES & GEN. MORTGAGE CO., LTD. *v.* LEWIS. [1949] 2 All E.R. 573.

In re A DEBTOR.

[No. 229 of 1927.]

Bankruptcy—Receiving Order—Judgment Debt—Power of Court to go behind Judgment—Voidable Contract—Loan—Commission paid by Lender to Agent of Borrower—Ignorance of Borrower of Fact—Court not satisfied with Proof of Petitioning Creditor's Debt—Prevention of Corruption Act, 1906 (6 *Edw.* 7, *c.* 34), *s.* 1, *sub-s.* 1—*Bankruptcy Act,* 1914 (4 *& 5 Geo.* 5, *c.* 59), *s.* 5, *sub-s.* 3.

The debtor employed one L. as his agent to negotiate a loan for him with a money-lender. The petitioning creditor, who was a money-lender, lent the debtor 60*l.* on his promissory note for 100*l.*, and without the knowledge or consent of the debtor paid L. a commission. The petitioning creditor subsequently recovered judgment against the debtor for the amount of the promissory note in default of appearance, and issued a bankruptcy notice based on the judgment. The debtor having failed to comply with the bankruptcy notice, the petitioning creditor presented a bankruptcy petition against him. On the hearing of the petition before the registrar it appeared for the first time that a commission had been paid by the petitioning creditor to L. The registrar held that although L. was no doubt the agent of the debtor, he was not satisfied that in the circumstances he was acting solely as the debtor's agent, and made a receiving order against the debtor.

On appeal:—

Held, that the payment of the commission to L. by the petitioning creditor without the knowledge or consent of the debtor rendered the contract voidable, if not void, against the debtor.

Held, therefore, reversing the decision of the registrar, that the act of bankruptcy being founded on a contract which was voidable by the debtor, the Court ought not, within the meaning of s. 5, sub-s. 3, of the Bankruptcy Act, 1914, to be satisfied with the proof of the petitioning creditor's debt, and that the receiving order must therefore be rescinded.

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APPEAL by the debtor from a receiving order made against him by Mr. Registrar Mellor.

The facts, which are more fully stated in the judgment of the Master of the Rolls, were shortly as follows :—

The debtor, who had had four previous transactions with money-lenders, employed one Latter as his agent to negotiate a loan with Bennett, a money-lender, and paid him a commission for so doing. Latter was known by Bennett to be the agent of the debtor. Bennett lent the debtor 60*l.* on his promissory note for 100*l.*, and paid Latter a commission of 7½ per cent. on the 60*l.* lent. The debtor was unaware at the time that the commission was paid by Bennett to Latter. Bennett subsequently obtained judgment in an action for the amount due on the promissory note in default of appearance by the debtor, and issued a bankruptcy notice based on the judgment. The debtor having failed to comply with the bankruptcy notice, Bennett on March 1, 1927, presented a bankruptcy petition against him. On March 31, 1927, the petition was heard before the registrar, and on May 13 a receiving order was made against the debtor. On the hearing before the registrar it appeared from the evidence for the first time that the commission had been paid to Latter by Bennett, and the point was then taken on behalf of the debtor that the payment by Bennett of the commission to Latter without the debtor's knowledge was so corrupt as to avoid the whole transaction and to bring it within the provisions of s. 1, sub-s. 1, of the Prevention of Corruption Act, 1906. The registrar held that although Latter was no doubt the agent of the debtor he was not satisfied that in the circumstances he was acting solely as the debtor's agent. Nor was he satisfied that in the circumstances of the case Latter acted corruptly in accepting the 7½ per cent. from the petitioning creditor. He accordingly made a receiving order against the debtor.

The debtor appealed.

Clayton K.C. and *Harold Simmons* for the appellant. It is submitted that the payment by Bennett to Latter of the

commission without the knowledge or consent of the debtor rendered the whole transaction between Bennett and the debtor void. Under the Prevention of Corruption Act, 1906, s. 1, it is made a criminal offence to give or to receive a bribe. It was admitted or proved that Latter was the agent of the debtor to negotiate the terms of the loan for him. Bennett admitted that he paid Latter a commission and it was proved that the payment of such commission was not disclosed by Bennett to the debtor. The transaction was therefore tainted with illegality and was thereby rendered void. It was unlawful therefore for Bennett even to recover the money he had lent: *Shipway* v. *Broadwood* (1); *Victorian Daylesford Syndicate* v. *Dott* (2); *Bonnard* v. *Dott* (3); *Cornelius* v. *Phillips* (4); *Whiteman* v. *Sadler*. (5) As the debtor was unaware of the payment of the commission at time he allowed judgment to go against him by default he has not lost his right to rescind the transaction: *Panama and South Pacific Telegraph Co.* v. *India Rubber, Gutta Percha, and Telegraph Works Co.* (6) The Bankruptcy Court has power to go behind a judgment and to require satisfactory evidence that the debt on which the proof is founded is a real debt: *In re Fraser* (7); *In re Van Laun* (8); *In re Flatau*. (9) Under s. 5 of the Bankruptcy Act, 1914, the onus is on the petitioning creditor to satisfy the Court that he has a good petitioning creditor's debt, and in the present case he has failed to do so and no receiving order ought therefore to have been made against the debtor. The petitioning creditor ought not now to be allowed to amend his petition by basing it on a claim for money had and received instead of money due on the promissory note: *In re A. H. Van de Heydt*. (10)

Wallington for the respondent Bennett. In *In re A. H. Van de Heydt* (10) the Court did not purport to decide whether the contract in that case was void or voidable. It looked at the

(1) [1899] 1 Q. B. 369.
(2) [1905] 2 Ch. 624, 629; [1906] 1 Ch. 747*n*.
(3) [1906] 1 Ch. 740.
(4) [1918] A. C. 199, 205, 211.
(5) [1910] A. C. 514.
(6) (1875) L. R. 10 Ch. 515.
(7) [1892] 2 Q. B. 633.
(8) [1907] 2 K. B. 23, 30.
(9) (1888) 22 Q. B. D. 83, 85.
(10) Unreported. C. A. June 20, 1919.

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petition to see whether the amendment was such as would show an available act of bankruptcy. Even assuming in the present case that debtor were to be allowed to rescind the contract, he could only do so on the terms of his repaying the money he has received, and there would remain a debt of more than 50*l.*, as it is clear that the respondent parted with 60*l.* to the debtor or his agent or to both. I am not asking to amend the petition. The petition is founded on the judgment, which is stated to be on a promissory note. The bankruptcy notice was based on the judgment, which is a clean judgment for the amount stated. The position, therefore, is that if the debtor had taken steps to set the judgment aside, the lowest sum to which he could have had the debt reduced was 50*l.* 10*s.* Until that judgment is set aside the Bankruptcy Court has no power to go behind it. The circumstances in which the Court will go behind a judgment are confined within very narrow limits. The cases show that where fraud or collusion is proved in obtaining the judgment the Court will go behind it. If it is plain after the trial that some miscarriage of justice has taken place the Court would be bound to say that there was no good debt and therefore that there was no ground for making a receiving order. The transaction here has not been avoided. The debtor has said that he is entitled to avoid it, but has taken no steps to do so. He now says: "I owe the lender nothing, because he has committed a criminal offence." Under the Money-lenders Act, 1900, if a money-lender enters into an illegal transaction he cannot recover, but the debtor may do so, because he is one of a protected class. In *Bartram & Sons* v. *Lloyd* (1) a principal had given a bribe to the agent of the other principal, and Collins M.R. there dealt with the question whether the transaction was void or voidable.

[SCRUTTON L.J. That case does not expressly decide whether the transaction was void or voidable, but the case was dealt with on the basis that the transaction was voidable.]

It shows that the contract may be voidable, but not void.

(1) (1904) 90 L. T. 357.

Contracts with money-lenders are in quite a different position from contracts with other persons, because they are, in certain circumstances, made illegal by statute. At common law, apart from statute, if there is anything wrong in the inception of the contract, the contract is not thereby made void but voidable. The Prevention of Corruption Act, 1906, deals only with the relations between the principal and the agent, and there is nothing in the Act which extends its operation to the relations between principal and principal.

[LORD HANWORTH M.R. We need not trouble you on the question whether the Act makes the contract void.]

The fact that the money-lender paid a commission to Latter is prima facie evidence that Latter was the agent of the money-lender. There is no evidence as to which of the two parties was the principal of Latter. The question is whether at all material times Latter was not as much the agent of one party as of the other. The Act does little more than make that a misdemeanour which before was not a misdemeanour. On a fair reading of the evidence, it is submitted that Latter was the agent of both parties, and that the mere fact that after the transaction was completed a commission was paid to him did not render the transaction void. The registrar was bound, in the circumstances, to find that the transaction was not void. The conduct of the debtor shows that his object was not to rescind the voidable contract, but to escape from the obligation of repaying any part of the money he had borrowed.

Clayton K.C. in reply.

LORD HANWORTH M.R. In this case we have dealt with the facts and the decision come to by the registrar, who made a receiving order on May 13, 1927.

P. Bennett was a money-lender. The appellant was in the early part of last year anxious to raise money, and employed one Latter to introduce him to a money-lender and as his agent to negotiate a loan with the money-lender. The appellant was thirty-five years of age and had had since

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1922 four previous transactions with money-lenders, and had had to rely on his father to extricate him. The present transaction was negotiated by Latter, whose business was the negotiation as agent of such transactions, and from him the appellant had received a circular. I have not looked at that circular, as I have not thought it necessary, no reliance having been placed upon it. It is clear that Latter got into touch with the appellant, and, acting as his agent, took him to Bennett the money-lender. The evidence as to that is agreed. The debtor says: "I paid Latter 6*l.* commission; I did not know Bennett was paying him anything." Bennett says: "I negotiated with Latter the terms of the loan. He is not a partner of mine."

It is clear that Latter came to the lender as the acknowledged agent of the borrower, and that Latter gave assistance to his client the borrower. On those terms the transaction was entered into. The amount to be lent was agreed at 60*l.*, and for that a promissory note was taken by Bennett for 100*l.* The terms of the loan were very hard, but the case does not turn on whether the charge for interest should be reopened. It is therefore unnecessary to form an opinion as to whether the amount of the interest charged should stand. Bennett says: "I paid Latter a commission of 7½ per cent. on the 60*l.* I lent." It is clear that the borrower knew nothing of that commission paid by Bennett to Latter. It is also clear from the evidence that a commission was paid to Latter in this transaction which was not revealed, as it ought to have been, to the borrower, and that it was paid by Bennett to Latter without the knowledge or consent of the borrower. The registrar says: "Although Latter was no doubt the agent of the debtor I am not satisfied that he was acting solely as the debtor's agent, nor am I satisfied that in the circumstances of the present case Latter acted corruptly in accepting the 7½ per cent. from the petitioning creditor." It is plain, as the matter stands, that the commission was paid to Latter for acting in the matter in the interest of the lender, and without the knowledge and consent of the debtor.

I respectfully agree with what was said by Chitty L.J. in *Shipway* v. *Broadwood* (1) that "Directly it is established that money was paid or promised to the agent of the other party, it is quite unnecessary to go further and see what effect that had on the mind of the person to whom it was paid or to be paid." It would therefore appear that, if money were paid by the lender to the borrower's agent without the consent of the borrower, whose agent Latter was, that is sufficient. Mr. Wallington has suggested that there is nothing to show that the commission paid by the lender to Latter was not paid as a matter of generosity, or that it altered, to the debtor's disadvantage, the terms of the loan, or induced Latter to act against the interests of his principal, the debtor, and that such a commission was not fraudulent unless paid with the object of inducing Latter to act in the interest of the lender only; but it seems to me, following *Shipway* v. *Broadwood* (2), that if a sum is offered by the money-lender to the borrower's agent, it can only be accepted with the knowledge and assent of the borrower.

By a writ issued on January 26, 1927, an action for repayment of 100*l.* due upon the promissory note was commenced by Bennett. The debtor did not enter an appearance in the action, and judgment on February 5 was given against him by default. On February 16 a bankruptcy notice was issued, based on the judgment obtained in that action, requiring payment of 105*l.* 12*s.* 6*d.* within seven days. It appears that after the writ was issued 5*l.* was paid by the appellant, thereby reducing the amount payable on the promissory note to 95*l.*, and that the petitioning creditor obtained judgment for 105*l.* 12*s.* 6*d.*, made up of the 95*l.*, 3*l.* 5*s.* for interest and 7*l.* 7*s.* 6*d.* for costs. The debtor failed to comply with the bankruptcy notice, and on March 1, 1927, a bankruptcy petition was presented against him. On March 31 an application was heard for a receiving order, and on May 13 a receiving order was made against the appellant. After evidence had been given on the hearing of the petition, from which it appeared for the first time that

(1) [1899] 1 Q. B. 369, 373. (2) [1899] 1 Q. B. 369.

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a commission had been paid by the lender to Latter, the point was taken that the payment of commission by the lender to Latter was so corrupt as to avoid the whole transaction, and brought the case within the provisions of s. 1, sub-s. 1, of the Prevention of Corruption Act, 1906, and cases were cited in support of that contention.

Victorian Daylesford Syndicate v. *Dott* (1), before Buckley J., was cited, whose judgment in that case was approved by the Court of Appeal in *Bonnard* v. *Dott* (2), and also *Whiteman* v. *Sadler*. (3) Those cases go to show that where there is a criminal act the contract is tainted by that act and cannot be relied upon. They are clear authority that Latter could not recover commission from Bennett, and that Bennett could not enforce any contract with Latter. But the question is how far that affects the contract between Bennett and the debtor. The act of bankruptcy in this case was committed by a man who, if and when he knew the facts, had a right to set aside the contract as voidable. That follows from the decision in *Shipway* v. *Broadwood* (4) and from what was said in *Panama and South Pacific Telegraph Co.* v. *India Rubber, Gutta Percha, and Telegraph Works Co.* (5), that such a contract is voidable. The appellant did not know until the hearing before the registrar that at the time of the transaction, he, being unaware of the commission given by Bennett to Latter, was entitled to declare the contract void, and therefore now having discovered his right he is entitled to set it up, though it is said that as he did not put it forward before he cannot now rely upon it. It was argued before the registrar that the transaction ought not to be treated as one originally voidable or void, as the borrower never offered to pay back the money borrowed.

The circumstances in which the Court can go behind a judgment were considered in *Ex parte Lennox* (6) and also in *In re Fraser* (7), where Lord Esher M.R. said: "The decision (in *Ex parte Lennox* (6)) is based upon the highest ground—

(1) [1905] 2 Ch. 624; [1906] 1 Ch. 747*n*.
(2) [1906] 1 Ch. 740.
(3) [1910] A. C. 514.
(4) [1899] 1 Q. B. 369.
(5) L. R. 10 Ch. 515.
(6) (1885) 16 Q. B. D. 315.
(7) [1892] 2 Q. B. 633, 636.

viz., that in making a receiving order, the Court is not dealing simply between the petitioning creditor and the debtor, but it is interfering with the rights of his other creditors, who, if the order is made, will not be able to sue the debtor for their debts, and that the Court ought not to exercise this extraordinary power unless it is satisfied that there is a good debt due to the petitioning creditor."

Applying that principle to the present case, as the act of bankruptcy was founded on a contract voidable by the debtor, ought the Court to be satisfied with the proof of the petitioning creditor's debt or of the act of bankruptcy, and if not so satisfied, ought it not, under s. 5, sub-s. 3, of the Bankruptcy Act, 1914, to dismiss the petition? That sub-section is as follows: "If the Court is not satisfied with the proof of the petitioning creditor's debt, or of the act of bankruptcy, or of the service of the petition, or is satisfied by the debtor that he is able to pay his debts, or that for other sufficient cause no order ought to be made, the Court may dismiss the petition." In this case the act of bankruptcy being founded on a debt in respect of what, in my opinion, is a voidable contract, the Court ought not to be satisfied with the proof of the petitioning creditor's debt.

We have been referred to *In re A. H. Van de Heydt* (1), a case decided in this Court in which the question of the payment of an improper commission arose. An amendment of the petition was there allowed by the registrar by substituting a claim for money lent in lieu of a claim for the balance due on a promissory note. The Court decided that the amendment ought not to have been allowed, and held that the contract was voidable and not void. Warrington L.J. said: "I think that the registrar should have left the petitioner to such right of enforcing liability as he might have. By April 3 there was no available act of bankruptcy, but I do not rely upon that but on a more general ground." And the general ground on which the learned Lord Justice relied was that the Court will not assist a creditor, who, having in his petition based his claim to recover a sum of

(1) Unreported. C. A. June 20, 1919.

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money on one ground, seeks to base it on a totally different ground.

I hold, therefore, in accordance with s. 5, sub-s. 3, of the Act of 1914, that the Court is not satisfied with the proof of the petitioning creditor's debt, that no alteration ought to be allowed in the nature of his claim, and that there is sufficient cause to justify the Court in refusing to make the order.

The appeal will, therefore, be allowed and the receiving order discharged.

Scrutton L.J. This is not an easy case to determine, and, as I have said, I have considerable doubt about it, but I do not feel able to dissent, as my brothers see their way to decide it in favour of the appellant. The facts are simple, but the legal effect resulting from them is difficult to determine. The petitioning creditor founds his petition on a default judgment. It is well settled that it is open to the Bankruptcy Court to go behind a judgment, and the question raised before the registrar was whether a commission paid to the borrower's agent by the lender without the borrower's knowledge was corrupt under the Prevention of Corruption Act, 1906, so as to render the whole transaction fraudulent and void, and to entitle the debtor to have the petition dismissed. The registrar said that though Latter was no doubt the agent of the debtor he was not satisfied that he was acting in the transaction solely as the debtor's agent. Nor was he satisfied that in the circumstances Latter acted corruptly in accepting the commission of $7\frac{1}{2}$ per cent. from the petitioning creditor. That conclusion of the registrar is a very dangerous one to the commercial world and to commercial morality. A man who is the agent of A. in a transaction between A. and B., and who also acts secretly for B. in the same transaction, is presumed to act corruptly. Common law authorities require the Court to hold that that is a corrupt practice, and, in my opinion, the Court ought to presume fraud in such circumstances. It seems to me a dangerous thing to allow a man to say: "Although you did not know it, I was also agent for the other party." I

rest my judgment on *Harrington* v. *Victoria Graving Dock Co.* (1); *Smith* v. *Sorby* (2), and on the decisions in this Court in *Shipway* v. *Broadwood* (3) and in *Bartram & Sons* v. *Lloyd.* (4) I feel therefore that there is no difficulty in holding that there was here fraud by which the contract sued on was secured. What then is the effect of that? It was argued that under the Prevention of Corruption Act, 1906, the contract was wholly void. If it was wholly void, though the contract should be for the benefit of the borrower he could not enforce it, and it is said that a contract obtained by a bribe is necessarily void as against both parties, but I cannot agree with that contention. If the contract is voidable only it gives the innocent party a right to rescind. There is no authority that a contract obtained by a bribe is void against both parties. Then comes the question whether, the contract being voidable, a party to it can avoid it without repaying the money received by him under the contract. Usually you cannot rescind unless you restore in integrum. I have considerable doubt whether it is enough for a person who discovers fraud in the contract to say "I rescind" without offering to repay the money received by him under the contract, and whether he is entitled in those circumstances to say the contract is gone, it never existed. But I have no sympathy with a person who pays bribes to other persons' agents, and in the circumstances I do not dissent from a judgment which refuses to give a remedy in bankruptcy to a person who does such things. In what I have said I do not wish to prejudice any proceedings which may be taken hereafter.

Sect. 5, sub-s. 3, of the Bankruptcy Act, 1914, allows the Court to dismiss a petition if it is not satisfied with the proof of the petitioning creditor's debt. The borrower in this case not being aware at the time of the petition of his right to rescind the contract, I am not satisfied with the proof of the petitioning creditor's debt, and I think it is best to leave the parties to their legal remedies. There is a default

(1) (1878) 3 Q. B. D. 549.
(2) (1875) 3 Q. B. D. 552*n*.
(3) [1899] 1 Q. B. 369.
(4) 90 L. T. 357.

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judgment outstanding which is not touched by these proceedings, and the debtor can proceed to have it set aside if he so wishes. It is based on a contract obtained by fraud.

SARGANT L.J. I agree that this appeal should be allowed. The debtor was brought into contact with Latter, who appears to have been a tout of Bennett, and to have accepted a bribe from the lender unknown to the borrower whose agent he was. It is a very gross case of bribery and is clearly struck at by the Prevention of Corruption Act, 1906, but that is not sufficient to make the transaction void throughout. The Prevention of Corruption Act merely hits the transaction between Latter and Bennett. Here it is quite clear that directly the borrower found out that a bribe had been paid to Latter by the lender he was entitled to set it up as a defence to a claim by the money-lender under the promissory note. In *Shipway* v. *Broadwood* (1) there was no contract to rescind, the cheque was merely stopped and that was sufficient to defend the action. Here it is sufficient to say that the promissory note was bad. In the present case it is said that the debtor has submitted to judgment and there is no reason for interfering. But that is to neglect the principle of *In re Fraser*. (2) Here it can be said against the debtor that he did not take the objection when sued on the promissory note, that the transaction was voidable, and that he let judgment go by default. But he was at that time unaware of his right to rescind the contract, as he did not then know that Latter had been paid a commission by the lender. That fact did not appear until the examination of Bennett in the bankruptcy proceedings. I think the case is well within s. 5, sub-s. 3, of the Bankruptcy Act, 1914, and that the Court ought not to allow an amendment of the petition which would substitute one cause of action for another.

Appeal allowed.

Solicitors for appellant: *C. Butcher & Simon Burns.*
Solicitors for respondent: *Isadore Goldman & Son.*

(1) [1899] 1 Q. B. 369. (2) [1892] 2 Q. B. 633.

W. I. C.

In re FORSEY AND HOLLEBONE'S CONTRACT.

C. A.
1927
EVE J.
May 26.
C. A.
July 25, 26.

[1927. F. 168.]

Vendor and Purchaser—Contract—Property sold free from Incumbrances—Resolution of Local Authority to prepare Town Planning Scheme within their Area—Registration of Resolution as Land Charge—Property sold situate within Area—Existence of Resolution unknown both to Vendor and Purchaser—Whether Registered Resolution an Incumbrance—Whether Purchaser to be deemed to purchase with Notice of Incumbrance—Town Planning Act, 1925 (15 *Geo.* 5, *c.* 16), *s.* 2, *sub-s.* 2—*Law of Property Act*, 1925 (15 *Geo.* 5, *c.* 20), *s.* 198—*Land Charges Act*, 1925 (15 *Geo.* 5, *c.* 22), *s.* 15, *sub-s.* 7—*Law of Property (Amendment) Act*, 1926 (16 & 17 *Geo.* 5, *c.* 11), *Sched.*

By clause 1 of a contract, dated December 10, 1926, the purchaser agreed to purchase certain premises "for an estate in fee simple absolute, free from incumbrances," except as thereinafter mentioned. Clause 2 provided that the property was sold subject to the restrictive and other covenants contained or referred to in a conveyance, dated September 28, 1925. The deposit was paid by the purchaser on the same day. Shortly before the date fixed for completion the purchaser discovered that the property was included in the area proposed to be dealt with by the local authority by a resolution dated October 26, 1925, under s. 2 of the Town Planning Act, 1925, which resolution had been registered as a land charge under the Land Charges Registration Act, 1925, in January, 1926. Neither the vendor nor the purchaser was aware of the existence of this resolution at the date of the contract.

On an application by the purchaser for a declaration that the vendor had not shown a good title to the property sold in accordance with the contract and for repayment of the deposit:—

Held, by Eve J. and the Court of Appeal, that the mere passing and registration of the resolution by the local authority did not operate to impose on the land any subsisting incumbrance within the meaning of clause 1 of the contract; that the sections of the Act of 1925 showed that the purpose of the registered resolution was not so much to impose restrictions on the land as to prevent unreasonable claims being made by persons who bought up land subject to the scheme; and that there was nothing like an interference with the property which made it different from that which was contracted to be sold.

Held, also, by Eve J., that even if the registered resolution was an incumbrance, it was an incumbrance of such a nature that the purchaser must, under s. 198 of the Law of Property Act, 1925, be deemed to have contracted with actual notice of its existence, and was therefore precluded from refusing to complete the contract.

VENDOR AND PURCHASER SUMMONS.

By a contract in writing, dated December 10, 1926, and made between Jessie Mary Forsey (thereinafter called "the

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vendor") of the one part and Florence Amy Hollebone (thereinafter called "the purchaser"), the purchaser agreed to purchase from the vendor certain premises described in the schedule thereto and known as "Birklands," No. 36 Upperton Road, Eastbourne. The contract contained (inter alia) the following clauses:—

Clause 1. "The vendor hereby agrees to sell and the purchaser agrees to purchase the freehold property shortly described in the schedule hereto for an estate in fee simple absolute in possession free from incumbrances except as hereinafter mentioned at the price of 3200*l.* The sum of 320*l.* as a deposit and in part payment of the purchase money having been paid to Edgar Horn of Eastbourne aforesaid, estate agent, as stake holder, the balance shall be paid on the completion of the purchase."

Clause 5. "The property is sold subject to the restrictive and other covenants (a copy of which has been furnished to the purchaser or her solicitor) contained or referred to in a conveyance dated the 28th day of September, 1925, and made between Commander Walter Raleigh Gilbert and Lancelot Prideaux Brune of the first part, Grace Catherine Rose Davies Gilbert of the second part and the vendor of the third part and the purchaser shall be deemed to purchase with full notice thereof."

In due course requisitions on title were made and answered and a conveyance of the property sold prepared.

On December 30, 1926, shortly before the date fixed for the completion of the purchase, the purchaser's solicitors applied to the Town Clerk of Eastbourne (who was the local registrar) for an official search of the Register of Local Land Charges against the property agreed to be sold, and on January 1, 1927, he received from him a certificate of the result of such search, from which it appeared that the following entry had been made in January, 1926, in the register: "Resolution passed on the 26th October, 1925, by the Town Council of Eastbourne in pursuance of section 2 of the Town Planning Act, 1925, deciding to prepare a town planning scheme with reference to an area situate wholly within the borough and

inclosed within the inner edge of a blue border on map No. 1."

The property sold was situate within the area proposed to be dealt with by the resolution. Neither the vendor nor the purchaser was aware of the existence of this resolution at the date of the contract or until the receipt of the certificate of search.

The purchaser contended that the resolution and its registration constituted an incumbrance within the meaning of clause 1 of the contract and issued a summons under s. 49 of the Law of Property Act, 1925, and Order LV., r. 14A, asking for: (1.) a declaration that the vendor had not shown a good title to the property, the subject of the contract; repayment by the vendor of the deposit money, together with interest at the rate of 5 per cent. from December 10, 1926, until repayment; (3.) payment by the vendor of the purchaser's costs of investigating the title, and of and incident to the application.

The summons was heard before Eve J. on May 26, 1927.

Topham K.C. and *Byrne* for the purchaser. At the date of the contract neither of the parties had any knowledge of the resolution passed on October 26, 1925. This resolution and its registration were the only steps taken by the council towards putting the scheme into operation. Under these circumstances it is necessary to look at the provisions of the Town Planning Act, 1925. Under s. 1 the local authority may make a town planning scheme in respect of any land likely to be used for building purposes, although there is no immediate intention of putting the scheme into operation. Under s. 2, sub-s. 2, a scheme adopted by the local authority cannot have effect unless it is approved by the Minister, and he may refuse to approve any scheme, except upon certain conditions. Sect. 7 gives the local authority the right to demolish any erection on land subject to the scheme. That section alone renders any land subject to a scheme useless to the owner. And by reason of s. 11, as soon as a resolution has been passed approving a scheme, no compensation can

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be obtained by the owner of land injuriously affected by the scheme.

This property was sold free from incumbrances. Before completion of the contract, the purchaser discovered that a town planning scheme, which might very seriously affect the land, had been passed, and registered as a land charge. Under s. 15, sub-s. 7, of the Land Charges Act, 1925, such a resolution was deemed to be a restrictive covenant.

The vendor relies on s. 198 of the Law of Property Act, 1925, under which, he contends, the purchaser must be deemed to have had actual notice of the resolution. That would be a most far-reaching proposition. *Cato* v. *Thompson* (1) was the last case dealing with this proposition. It was there held that the purchaser, although there was evidence that he knew of the restrictions at the time of the contract, was entitled to recover the deposit money. That case would govern the present one, even if s. 198 means that the applicant had actual notice of the resolution. The cases are summarized in *McGrory* v. *Alderdale Estate Co.* (2)

The premises were sold free from incumbrances, and the purchaser is entitled to an unincumbered freehold title: *Phillips* v. *Caldcleugh.* (3) This property is subject to very serious incumbrances, and the purchaser is entitled to the declarations she asks for, and to repayment of the deposit money.

Farwell K.C. and *C. E. Harman* for the vendor. The resolution and its registration prevent the purchaser from taking this objection. It is not necessary for the vendor to prove that the purchaser knew of the resolution. Sect. 198 says that she knew. The vendor also denies that the resolution is an incumbrance.

Oral evidence cannot be given to vary a written contract: see per Lord Finlay L.C. in *McGrory* v. *Alderdale Estate Co.* (4)

The registered resolution is not an incumbrance in the ordinary sense. If the Law of Property (Amendment) Act,

(1) (1882) 9 Q. B. D. 616.
(2) [1918] A. C. 503.
(3) (1868) L. R. 4 Q. B. 159.
(4) [1918] A. C. 503, 508.

1926, had not been passed, the purchaser could have said that s. 15, sub-s. 7, of the Land Charges Act, 1925, made it an incumbrance, but the Amending Act cuts out the words "shall be deemed to be a restrictive covenant." This resolution is not an incumbrance at all: see s. 205, sub-s. 1 (vii.), of the Law of Property Act, 1925. The only thing that has been done by the council is to pass and register the resolution. That resolution may not be approved by the Minister, or if approved by him, it may be approved with such modifications that this property would not be affected: s. 2, sub-s. 2, of the Town Planning Act, 1925. In *In re Farrer and Gilbert's Contract* (1) it was held that although there was a certain future charge on the property, such future charge was not an incumbrance. The principle of that decision applies here. This resolution is a mere potential liability to a restriction, and does not constitute an incumbrance.

Topham K.C. in reply. Owing to this resolution, the property is substantially different from that which the purchaser contracted to buy, and she is entitled to rescind the contract: *Lee* v. *Rayson*. (2) The purchaser is protected by s. 43 of the Law of Property Act, 1925. That section wipes out s. 198 of that Act.

EVE J. This is a summons issued by the purchaser of some property situated in Upperton Road, Eastbourne, asking for a declaration that the vendor has not shown a good title in accordance with the contract. The contract is a written contract dated December 10, 1926, whereby (clause 1) the vendor "agrees to sell and the purchaser agrees to purchase the freehold property shortly described in the schedule hereto for an estate in fee simple absolute in possession free from incumbrances, except as hereinafter mentioned, at the price of 3200*l*." By clause 5: "The property is sold subject to the restrictive and other covenants (a copy whereof has been furnished to the purchaser or her solicitor) contained in or referred to in a conveyance dated the 28th day of September, 1925. . . . ."

(1) [1914] 1 Ch. 125. (2) [1917] 1 Ch. 613.

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Reading clauses 1 and 5 together it is clear that in this contract the expression "incumbrance" or "incumbrances" must be read as extending to restrictive or other covenants affecting the land, that is, read in a sense in which the expression is very frequently used in transactions of this nature.

The first question, therefore, is whether the particular matter of which the purchaser complains is an incumbrance. The dispute arises in these circumstances. On October 26, 1925, the Town Council of Eastbourne in exercise of the powers conferred upon them by the Town Planning Act, 1925, decided by resolution to prepare a town planning scheme with reference to land within their area which was delimited by a line marked upon a map or plan prepared for that purpose, and included in the area so delimited are the premises the subject-matter of this contract. The resolution so passed was registered as a land charge in January, 1926, some months after the Act came into force. The question whether or no this registered resolution constitutes an incumbrance must be determined on an examination of the Act of 1925 as amended by the Law of Property (Amendment) Act, 1926. One must see to what extent the resolution and its registration affect the land. By s. 15, sub-s. 7, of the Land Charges Act, 1925, it is provided that: "For the purposes of this section, any prohibition of or restriction on the user or mode of user of land or buildings enforceable by any local authority by virtue of any statute or any order, scheme or instrument made in pursuance of any statute, and any resolution passed by a local authority to prepare or adopt a town planning scheme, shall be deemed to be a restrictive covenant, and where arising or passed after the commencement of this Act shall be registered by the proper officer as a local land charge." Pausing there it is obvious that under that sub-section the passing of this resolution and its registration would have constituted an incumbrance within the meaning of the contract. But under the Amending Act of 1926, the resolution or scheme ceases to be treated as a restrictive covenant, and sub-s. 7 is superseded by a

sub-section whereby it is enacted that the provisions of s. 15 of the Land Charges Act shall apply to "any town planning scheme made by, or any authority or resolution to prepare or adopt a town planning scheme given to or passed by, a local authority, whether made, given or passed before or after the commencement of this Act, as if the scheme, resolution, authority, prohibition, or restriction were a local land charge, and the same shall be registered by the proper officer as a local land charge accordingly." The result is that one has to look at the Town Planning Act of 1925 for the solution of the question whether or no resolutions so passed and registered can be said to be an incumbrance on the property the subject-matter of the sale.

Mr. Topham relies upon the results which follow in the wake of a resolution of this nature, and in particular the results which are to be found in ss. 7 and 10 of the Town Planning Act. But before one reaches those sections it is well to consider what the position is when the only matter in existence is the registered resolution, that is to say, before any further steps than the passing of the resolution and its registration have been taken. When the resolution is passed the next thing contemplated is the preparation of a scheme. The local authority having passed the resolution to prepare a town planning scheme is at any rate supposed to take some steps towards the preparation of the scheme. In this particular case there is very little evidence that any steps have been taken towards the elaboration of the scheme which was resolved upon. Assuming that that step is taken the next thing is to obtain the approval of the Minister of Health to the scheme. Sect. 2, sub-s. 2, provides: "A town planning scheme prepared or adopted by a local authority shall not have effect unless it is approved by order of the Minister, and the Minister may refuse to approve any scheme except with such modifications and subject to such conditions as he thinks fit to impose." Non constat that the scheme, which one must assume was adumbrated by the resolution passed by the council in October, 1925, will ever come into operation, or that if it comes into operation it will include

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the whole of the area and in particular this particular part of the area, or that it will be in such terms as will necessitate any interference whatever with the enjoyment of the property the subject-matter of this sale. If and when it is ultimately approved it has effect as if it were enacted in the statute, it becomes a statutory scheme of town planning, and then, and then only, follow the results which Mr. Topham says will be destructive or partially destructive of the amenities of this particular property, and may even result in the owner being unable to have the full enjoyment of the property which was contemplated at the time she entered into the contract. It is true, of course, that the restrictions which affect the property after the scheme has been approved by the Minister relate back in their operation to the inception of the scheme, but until that approval has been given there is really no scheme which can accurately be said in any way to affect the property the subject-matter of this sale. There is a potential interference with its enjoyment, but until that potentiality has ripened into an actual interference I cannot bring myself to hold that the property is affected in the sense that there is an incumbrance imposed on it by the mere passing of the resolution, and on those grounds I am prepared to hold, and do hold, that the mere passing and registration of a resolution of this nature does not operate to impose on the land included in the area any subsisting incumbrance.

It may well be that this is a conclusion which will not meet with approval elsewhere, and I must therefore deal with the other part of the case, which proceeds upon the footing that this is an incumbrance of which the purchaser had no knowledge until shortly before the date fixed for completion, and which the vendor cannot remove. Do these facts entitle her to avoid the contract? It is common ground that neither the vendor nor the purchaser knew of the passing of the resolution until after all the other questions had been disposed of and the conveyance actually executed ready for completion. What in these circumstances was the legal position of the contracting parties? That, as it seems to me, must be regulated by s. 198 of the Law of Property Act, 1925, which

provides that: "The registration of any instrument or matter under the provisions of the Land Charges Act, 1925, or any enactment which it replaces, in any register kept at the land registry or elsewhere, shall be deemed to constitute actual notice of such instrument or matter, and of the fact of such registration, to all persons and for all purposes connected with the land affected, as from the date of registration or other prescribed date and so long as the registration continues in force." By virtue of that section I think that both parties must be deemed to have contracted with actual notice of the existence of this resolution.

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I agree that the authorities cited by Mr. Topham establish this, that a vendor who has contracted to sell free from incumbrances cannot adduce evidence to prove the purchaser's knowledge of a particular incumbrance and assert a right to specific performance of the contract subject to that incumbrance, but this is because the reception of such evidence would be the admission of oral evidence to contradict and vary the terms of the written contract. This vendor is not driven to any such extremity. She has only to point to the section I have just read to show that when the contract was entered into vendor and purchaser must alike be deemed to have known of the existence of the incumbrance which the purchaser insists on as a good ground for avoiding the contract.

If this resolution, contrary to the conclusion I have arrived at, is an incumbrance affecting the land, it is in my opinion an incumbrance of which the purchaser had notice and of a nature which precludes her from now refusing to complete the purchase. Accordingly I dismiss the summons with costs.

P. J. B.

The purchaser appealed. The appeal was heard on July 25 and 26, 1927. C. A.

Topham K.C. and *Byrne*, for the appellant, repeated in substance the arguments used by them in the Court below,

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and in addition to the cases there cited referred to *Ellis* v. *Rogers*. (1)

Farwell K.C. and *C. E. Harman* for the respondent were only called upon to argue the first point—namely, whether the registered resolution constituted an incumbrance on the property within the meaning of the contract.

LORD HANWORTH M.R. This is an appeal from a judgment of Eve J. on a vendor and purchaser summons given on May 26, 1927. By a contract made on December 10, 1926, the vendor contracted to sell to the present appellant the freehold property described therein "for an estate in fee simple absolute in possession free from incumbrances except as hereinafter mentioned." The property sold was a villa residence standing in its own grounds abutting on Upperton Road in the county borough of Eastbourne. The incumbrances referred to were those mentioned in the contract, but the question on this appeal arises outside those incumbrances.

It appears that on October 26, 1925, a resolution had been adopted by the Town Council of Eastbourne to prepare a town planning scheme under the Town Planning Act, 1925, and the difficulty which has arisen is because that resolution has by statute a certain effect.

By the Town Planning Act, 1925, it is provided by s. 2, sub-s. 1: "A local authority may by resolution decide—(*a*) to prepare a town planning scheme with reference to any land within, or in the neighbourhood of, their area in regard to which a scheme may be made under this Act." This road, Upperton Road, was within the area, and by the resolution the borough council were acting within their powers under s. 2 of the Act. By sub-s. 2 it is provided: "A town planning scheme prepared or adopted by a local authority shall not have effect unless it is approved by order of the Minister, and the Minister may refuse to approve any scheme except with such modifications and subject to such conditions as he thinks fit to impose." That Minister is the Minister of

(1) (1885) 29 Ch. D. 661.

Health. When the Minister has approved the town planning scheme it is to have effect, by sub-s. 3, as if it were enacted in the Act; but by sub-s. 4 it may be varied or revoked by a subsequent scheme prepared or adopted and approved in accordance with the Act.

By s. 4 power is given to the Minister by special or general Order to provide that where a resolution to prepare or adopt a scheme has been passed the development of estates and building operations may be permitted to proceed pending the preparation, adoption and approval of the scheme, subject to such conditions as may be prescribed by the Order.

By an Order dated August 12, 1922, it was provided that the local authority may permit the building of houses, etc., to be continued under certain conditions. It is to be observed that this Order was made under the Housing, Town Planning, etc., Act, 1919, and not under the Act of 1925, but it is provided by s. 21 of the latter Act that nothing in the repeal shall affect any scheme, order or regulation made, or notice or approval given under the earlier Act. By s. 7 of the Act of 1925 power is given to the responsible authority to enforce the scheme, by removing, pulling down or altering any building or other work in the area which would contravene the scheme. By s. 10 compensation is to be paid in respect of property injuriously affected by the scheme, but by sub-s. 2 a person shall not be entitled to obtain compensation under the section after the date of the resolution of the local authority to prepare or adopt a scheme, unless (*b*) "as respects any building erected, contract made, or other thing done in accordance with a permission granted in pursuance of an order of the Minister allowing the development of estates and building operations to proceed pending the preparation, adoption or making and approval of the scheme." There is also a provision in s. 11 for the exclusion or limitation of compensation in certain cases.

Sect. 12 contains a rather remarkable provision. If a scheme has been adopted and put in force, and has injuriously affected any particular property, the responsible authority may at any time within one month after the date of an award

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of compensation give notice to the owner of the property of their intention to modify or withdraw all or any of the provisions of the scheme which gave rise to the claim for compensation. The result is that when the responsible authority find that if the scheme is carried through they may have to pay compensation they may withdraw it in respect of any particular property.

It is clear from the sections I have read that the date of the resolution for adoption of a scheme is important, because if after that date any building has taken place no compensation will be payable unless under s. 10, sub-s. 2 (*b*), leave to build had been obtained from the borough council. From and after October 26, 1925, therefore the land in Upperton Road was under this possible danger, that the scheme when prepared and passed might require part of the land to be taken and paid for in order to carry out the scheme. But there would be no right to compensation if the purchaser proceeded to build without the leave of the borough council. That resolution is a restrictive covenant within the Land Charges Act, 1925, s. 15, sub-s. 7, of which provides: "For the purposes of this section, any prohibition of or restriction on the user or mode of user of land or buildings enforceable by any local authority by virtue of any statute or any order, scheme or instrument made in pursuance of any statute, and any resolution passed by a local authority to prepare or adopt a town planning scheme, shall be deemed to be a restrictive covenant, and where arising or passed after the commencement of this Act shall be registered by the proper officer as a local land charge."

If that section had continued in force the resolution would have been deemed to be a restrictive covenant, and it is for the purposes of compensation that the resolution had to be registered. But sub-s. 7 is no longer in force, for by the Law of Property (Amendment) Act, 1926, the provisions of the sub-section have been qualified by the sub-section which has been substituted for it in the Schedule of Minor Amendments to that Act, the effect of which is that the scheme, resolution, prohibition or restriction is to be treated as a

local land charge, and is no longer to be deemed to be a restrictive covenant.

Eve J. has pointed that out and considered the effect of the words on the resolution. If the provisions of sub-s. 7 of s. 15 of the Land Charges Act, 1925, had stood as they were originally, the question might have arisen whether or not the resolution was a restrictive covenant, but it is no longer so: it is only a "local land charge." I think that Eve J. considered the matter from the right point of view, and that was: Is the resolution a restriction which affects the property so that the property which can now be conveyed is different from the property contracted to be sold? It appears to me that Eve J. came to a right conclusion in his judgment when he said that with regard to the land included in the scheme: "There is a potential interference with its enjoyment, but until that potentiality has ripened into an actual interference I cannot bring myself to hold that the property is affected in the sense that there is an incumbrance imposed on it by the mere passing of the resolution, and on those grounds I am prepared to hold, and do hold, that the mere passing and registration of a resolution of this nature does not operate to impose on the land included in the area any subsisting incumbrance."

There was in any case a fixed building line in Upperton Road. That constituted a restriction on the user of the front part of the property, apart altogether from any town planning resolution. Has then the position of the purchaser been affected in any real sense? A draft statement in relation to the scheme has been prepared. But even then the scheme has to be passed by the Minister. There may be restrictions imposed by the scheme on the purchaser, but I reject the view that the scheme operates as an existing incumbrance on the land. The resolution has only a certain effect as to compensation. I have gone through the various sections of the Town Planning Act, 1925, in order to show that the resolution is passed not so much for the purpose of imposing restrictions as of preventing unreasonable claims for compensation being made by persons buying up land

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subject to the proposed scheme. I think that Eve J. was right in saying that there was nothing like an interference with the property which made it different from that which was contracted to be sold.

I do not think the purchaser can say that the vendor has failed to make a good title. The appeal must be dismissed with costs.

SARGANT L.J. I am of the same opinion. This is a villa property with, obviously, a building line on the frontage. The Public Health Act, 1875, applies to Eastbourne and it is clear therefore that the owner of this land could not build anything in front of the house without the permission of the local authority. It also appears that this property was purchased from the owners of a much larger property, who imposed restrictions which affect it. The parties who entered into the contract were both quite ignorant of the existence of the resolution to prepare a town planning scheme. It is contended that the property is different from that which was contracted to be sold, that the vendor contracted to sell it free from incumbrances, and that here there is a restrictive condition which the vendor ought to, but cannot, clear off the title. But the purchaser could not expect to obtain a property on which she could build a garage or anything else in front of the building line. The only circumstance which might cause the property to be affected by the resolution to adopt the scheme is this : if the road in front were widened so as to make it a 50ft. road, ten feet might be taken off the front drive and garden. But even if twenty feet were taken for this purpose and the scheme went through, that would not, in my opinion, make the property a different property from that contracted to be sold. Quite apart from that, it is by no means certain that the scheme will be fully carried out ; and if it were, compensation would have to be paid for land affected.

A more specific objection is that this resolution constitutes an incumbrance on the property. I agree with the view taken by Eve J. that s. 15, sub-s. 7, of the Land Charges

Act, 1925, as amended by the Law of Property (Amendment) Act, 1926, is less onerous than it was before amendment; but in my opinion this resolution has never been a restrictive covenant at all. Sect. 10, sub-s. 2, of the Town Planning Act, 1925, imposes no restriction on the property, but if the purchaser were to build a garage or other small building within the twenty feet left for widening the road, he would not then be entitled to compensation, if it were taken. That is the sole result of the Town Planning Act, 1925, as regards this property; it is merely a potential exclusion of the right to compensation for a building which a purchaser cannot expect ever to get the right to build. It is outside the bounds of any reasonable expectation.

The obligations of the vendor on the sale included one to sell free from incumbrances, including restrictive covenants. I agree with the Master of the Rolls that there are numerous steps to be gone through, and before the property is affected, and in the end the only right taken away will be merely one to receive compensation for a highly problematical and hardly possible building. There is no real reason for refusing the vendor a declaration that she has made a good title to the property free from incumbrances. The appeal must be dismissed.

LAWRENCE L.J. I agree. I think that Eve J. has reached a right conclusion on the two main grounds in this case. The property is situate in an area which is now to be subjected to a town planning scheme, but no scheme has yet been settled. Only the first formal step towards such a scheme has yet been taken. I will assume that the scheme will go through and will embrace the property, still I agree with the learned judge that the objection of the purchaser on this ground is so shadowy that it cannot prevail.

On the second point I agree that the effect of the Town Planning Act, 1925, and the Order that has been made is not to impose any incumbrance upon the land. The possible deprivation of her right to compensation for taking or

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injuriously affecting her land is not an incumbrance such as would give the purchaser the right to refuse to complete the contract.

Appeal dismissed.

Solicitors for purchaser: *Wellington Taylor & Sons.*

Solicitors for vendor: *Burton, Yeates & Hart, for Charles & Malcolm, Worthing.*

W. I. C.

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